

No. 12492

United States
Court of Appeals
for the Ninth Circuit.

STEPHEN W. GERBER,

Appellant.

vs.

JACK E. MOLESWORTH,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED
MAY 2 1950

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Plaintiff and Appellee.

In the United States District Court for the Northern District of California, Southern Division

No. 28610G

JACK E. MOLESWORTH,

Plaintiff,

vs.

STEPHEN W. GERBER,

Defendant.

COMPLAINT FOR LIBEL

Now Comes plaintiff and for cause of action against defendant, alleges as follows:

I.

Plaintiff is a citizen of the state of Massachusetts, and defendant is a citizen of the state of California, residing in the Northern District of California. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00).

II.

On October 30, 1948, and for a long period of time prior thereto, plaintiff was, and now is, engaged in the business and occupation of philatelic broker, and stamp dealer at Boston, Massachusetts, and plaintiff enjoyed a good name and reputation as such.

III.

Defendant writes a column entitled "Pets and Peeves" in a weekly magazine known as "Weekly Philatelic Gossip". On or about October 30, 1948, defendant wrote in said column and caused to be published by said magazine, in Vol. 47, Number 9, Whole Number 1408, page 283 thereof, the following words concerning plaintiff:

What's A Mole Worth? Actually nothing, unless you skin it. The mole is a darn nuisance that burrows blindly and aimlessly until trapped. The philatelic species runs true to form as a bore and a nuisance. Sometime ago, he slipped the trap by disclaiming responsibility for substituting No. 460 for No. 478 in a sale. He professes to be a "philatelic broker" who has apparently been carrying on his limited operations at the expense of the large stamp auction houses. Quoting from a few of the reports we learn that, "His returns have always been late and excessive . . . If he doesn't sell them, he returns the stamps." Another report tells us that, "He practically returns about 90% of the lots and they have all taken him off their list. We are doing likewise." Another auction house quotes their experience to the effect that the mole returned \$270 from a total of \$300, after holding the property between two and three months. He justified the delayed returns with the unreasonable claim that the lots were not as described. From the information furnished to us it seems that he has operated at the auction houses' expense. He'd chisel on the

lots by offering them for sale. If unsuccessful, they would eventually be returned, long after settlement date. This type of operation is a new and clever angle: as long as it can be carried on. But the gravy train is grinding to a stop and it's a painful fact that the mole's worth will have to be tested in a different racket—maybe going to work for a bank or something.

IV.

Said "Weekly Philatelic Gossip" is sold and distributed, throughout the United States, to stamp collectors, stamp auctioneers, and other persons interested in philately.

V.

Said publication was and is false and defamatory. Said publication exposed and now exposes plaintiff to hatred, contempt, ridicule and obloquy, and the same had, and now has, a tendency to injure plaintiff in his said business and occupation of philatelic broker and stamp dealer.

VI.

Said publication was known by defendant to be false at the time he made the same, and he did not have probable or any cause for believing the same to be true. Said publication was made by defendant for the purpose of injuring, disgracing and defaming plaintiff and interfering with his business and occupation of philatelic broker and stamp dealer.

VII.

By reason of the said false and defamatory publication, plaintiff has suffered damages in the sum of One Hundred Thousand Dollars (\$100,000.00).

Wherefore, plaintiff prays judgment against defendant: (a) in the sum of One Hundred Thousand Dollars (\$100,000.00) general damages; (b) Fifty Thousand Dollars (\$50,000.00) exemplary damages; (c) costs of suit; and (d) for such other and further relief as this Court may deem just and proper.

/s/ LEONARD J. BLOOM,
/s/ M. S. HUBERMAN, ·
Attorneys for Plaintiff.

[Endorsed]: Filed February 4, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT

Comes now the defendant to answer the complaint:

I.

Admits the allegations contained in Paragraph I, III and IV of the Complaint.

II.

Answering Paragraph II of the complaint, the defendant admits that on October 30th, 1948, the plaintiff was engaged in the business of a philatelic

broker in Boston; the defendant denies the remaining averments in said paragraph.

III.

Answering Paragraph V of the complaint, the defendant denies that the publication is false or that it is defamatory; defendant further denies the remaining averments of said paragraph.

IV.

Answering Paragraph VI of the complaint, the defendant specifically denies each and every averment contained in said paragraph.

V.

Answering Paragraph VII of the complaint, the defendant denies that the plaintiff has been damaged in the amount alleged or in any other sum or at all.

As A First, Separate And Distinct Affirmative Defense, the defendant alleges that all statements made of and concerning the plaintiff which are the basis of the claim of the plaintiff are true.

As A Second, Separate and Distinct Affirmative Defense, the defendant alleges:

I.

That the "Weekly Philatelic Gossip" is a magazine which publishes items and discusses matters of common interest to philatelists and those who are engaged in the business of buying and selling

stamps; that defendant has been regularly employed for over two years by said magazine to write articles and a weekly column on such items or matters. That in the course of his employment defendant received unsolicited complaints relating to the improper business activities of the plaintiff; that while the defendant has no personal knowledge of the truth of such statements, said complaints were made by and communicated from sources that the defendant believed at the time and now believes to be reliable, truthful and authentic.

II.

That the defendant published said complaints in the manner set forth in plaintiff's claim as a matter of common interest to philatelists and those persons who are engaged in the business of buying and selling stamps; that at the time of publication and at the present time the defendant believes that said complaints are true; that said publications were not made with malice on the part of the defendant, nor with the intent of injuring the plaintiff.

As A Third, Separate and Distinct Affirmative Defense, the defendant alleges:

I.

The defendant incorporates herein as if set out at length the averments of Paragraphs I and II of the second separate and distinct affirmative defense.

II.

That the said publication is circulated in the State of California.

III.

That the plaintiff has not at any time demanded a retraction of the alleged defamation complained of.

IV.

That by the terms of section 48a of the Civil Code of the State of California, the complaint fails to state a claim against the defendant upon which relief can be granted.

Wherefore, the defendant prays that the plaintiff take nothing by his complaint and that the defendant be dismissed with his costs.

Dated: April 14th, 1949.

COOPER, WHITE & COOPER,
/s/ GEORGE A. HELMER,
Attorneys for Defendant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed April 14, 1949.

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT FOR LIBEL

Now Comes plaintiff and as and for a supplement to his complaint for libel in the above action, alleges as follows:

I.

Plaintiff is a citizen of the state of Massachusetts, and defendant is a citizen of the state of California, residing in the Northern District of California. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00).

II.

On March 5, 1949, and for a long period of time prior thereto, plaintiff was, and now is, engaged in the business and occupation of philatelic broker, and stamp dealer at Boston, Massachusetts, and plaintiff enjoyed a good name and reputation as such.

III.

Defendant writes a column entitled "Pets and Peeves" in a weekly magazine known as "Weekly Philatelic Gossip". On or about March 5, 1949, defendant wrote in said column and caused to be published by said magazine, in Vol. 48, Number 1, Whole Number 1426, page 11 thereof, the following words concerning plaintiff:

Gather Around, Dear Reader and enjoy the funniest story ever told. It furnishes proof positive that reporting stampic shenanigans is a risky voca-

tion; especially, when a few gents are allergic to publicity. *Pets and Peeves* (October 30, 1948) published an item under the heading, "What's A Mole Worth?" Although no name was mentioned, a part-time Boston dealer named Jack E. Molesworth figured out that the shoe fit. So-o-o, said J. E. M. has filed a libel action against us for a paltry \$150,000.00 to assuage his financial hurt as an upright, honest, unimpeachable and expert stamp dealer. (Don't laugh yet.) If selling a counterfeit stamp, if misrepresenting a stamp cataloguing at \$40.00 as being one catalogued at \$55.00, if unreasonable demands and claims, if allegedly unsatisfactory auction settlements—if IF IF IF all of these are the distinguishing characteristics of an upright, honest, unimpeachable and well-informed stamp dealer, then we apologize. (Laughter, please.) We are reminded of one of several libel suits in recent years. A bozo sued Drew Pearson for libel. When the case was tried, Pearson proved the "libel" and the bozo landed in the klink. When he saw the light, it was filtered through iron bars. We have two pertinent opinions, (1) this J. E. M. is being used as a tool to intimidate us in our fight for decency in philately, (2) this J. E. M. won't dare to bring the case to trial.

IV.

Said "Weekly Philatelic Gossip" is sold and distributed, throughout the United States, to stamp collectors, stamp auctioneers, and other persons interested in philately.

V.

Said publication was and is false and defamatory. Said publication exposed and now exposes plaintiff to hatred, contempt, ridicule and obloquy, and the same had, and now has, a tendency to injure plaintiff in his said business and occupation of philatelic broker and stamp dealer.

VI.

Said publication was known by defendant to be false at the time he made the same, and he did not have probable or any cause for believing the same to be true. Said publication was made by defendant for the purpose of injuring, disgracing and defaming plaintiff and interfering with his business and occupation of philatelic broker and stamp dealer.

VII.

By reason of the said false and defamatory publication, plaintiff has suffered damages in the sum of One Hundred Thousand Dollars (\$100,000.00).

Wherefore, plaintiff prays judgment against defendant: (a) in the sum of One Hundred Thousand Dollars (\$100,000.00) general damages; (b) Fifty Thousand Dollars (\$50,000.00) exemplary damages; (c) costs of suit; and (d) for such other and further relief as this Court may deem just and proper.

/s/ LEONARD J. BLOOM,

/s/ M. S. HUBERMAN,

Attorneys for Plaintiff.

[Title of District Court and Cause.]

STIPULATION AND ORDER PERMITTING
FILING OF SUPPLEMENTAL COM-
PLAINT FOR LIBEL

It is hereby stipulated by and between counsel for plaintiff and counsel for defendant that plaintiff may file the attached Supplemental Complaint for Libel, and that defendant may have ten (10) days from date hereof within which to answer said Supplemental Complaint for Libel.

Dated: June 28, 1949.

/s/ LEONARD J. BLOOM,
/s/ M. S. HUBERMAN,
Counsel for Plaintiff.

/s/ ALEX. L. ARGUELLO,
Counsel for Defendant.

It is hereby ordered that plaintiff may file the attached Supplemental Complaint for Libel in the above-entitled action, and it is further ordered that defendant may have ten (10) days from date hereof within which to answer said Supplemental Complaint for Libel.

Dated: July 5, 1949.

/s/ LOUIS GOODMAN,
United States District Judge.

[Endorsed]: Filed July 5, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT TO SUPPLEMENTAL COMPLAINT FOR LIABILITY

Comes Now the defendant to answer the supplemental complaint:

I.

Admits the allegations contained in Paragraphs I, III, and IV of the Complaint.

II.

Answering Paragraph II of the complaint, the defendant admits that on March 5, 1949, plaintiff was engaged in the business of a philatelic broker in Boston; defendant denies the remaining averments in said paragraph.

III.

Answering Paragraph V of the complaint, defendant denies that the publication is false or that it is defamatory; defendant further denies the remaining averments of said paragraph.

IV.

Answering Paragraph VI of the complaint, defendant specifically denies each and every averment contained in said paragraph.

V.

Answering Paragraph VII of the complaint, defendant denies that plaintiff has been damaged in the amount alleged or in any other sum or at all.

As a First, Separate and Distinct Affirmative Defense, defendant alleges that all statements made of and concerning the plaintiff which are the basis of the claim of the plaintiff are true.

As a Second, Separate and Distinct Affirmative Defense, defendant alleges:

I.

That the "Weekly Philatelic Gossip" is a magazine which publishes items and discusses matters of common interest to philatelists and those who are engaged in the business of buying and selling stamps; that defendant has been regularly employed for over two years by said magazine to write articles and a weekly column on such items or matters. That in the course of his employment, defendant received unsolicited complaints relating to the improper business activities of the plaintiff; that while the defendant has no personal knowledge of the truth of such statements, said complaints were made by and communicated from sources that the defendant believed at the time and now believes to be reliable, truthful and authentic.

II.

That the defendant published said complaints in the manner set forth in plaintiff's claim as a matter of common interest to philatelists and those persons who are engaged in the business of buying and selling stamps; that at the time of publication and at the present time defendant believes that said com-

plaints are true; that said publications were not made with malice on the part of defendant, nor with the intent of injuring the plaintiff.

III.

That plaintiff has not at any time demanded a retraction of the alleged defamation complained of.

IV.

That by the terms of section 48a of the Civil Code of the State of California, the complaint fails to state a claim against the defendant upon which relief can be granted.

Wherefore, defendant prays that plaintiff take nothing by his complaint and that defendant be dismissed with his costs.

Dated: This day of, 1949.

ARGUELLO and GIOMETTI,
Attorneys for Defendant.

State of California,
City and County of San Francisco—ss.

Stephen W. Gerber, being first duly sworn, deposes and says:

That he is the defendant in the above entitled action; that he has read the foregoing answer to supplemental complaint for liability and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information and belief and as to those matters he believes it to be true.

/s/ STEPHEN W. GERBER.

Subscribed and sworn to before me this 18th day of July, 1949.

[Seal] /s/ ALICE E. LOWRIE,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed July 26, 1949.

[Title of District Court and Cause.]

NOTICE OF INTENTION TO INTRODUCE
EVIDENCE OF SUBSEQUENT LIBELS

To defendant Stephen W. Gerber and to Arguello and Giometti, his attorneys:

Please take notice that at the trial of the above-entitled action, on September 1, 1949, plaintiff intends to introduce evidence in said action of libels of the defendant of and concerning plaintiff subsequent to the libels set forth in the complaint and supplemental complaint on file herein, to wit:

(1) That certain libel contained in a letter from defendant to one Larry Borenstein, dated February 20, 1949;

(2) That certain libel contained in the July 2, 1949, issue of "Weekly Philatelic Gossip" at page 555 thereof.

Dated: August 17, 1949.

/s/ LEONARD J. BLOOM,

/s/ M. S. HUBERMAN,

Attorneys for Plaintiff.

Receipt of Copy Acknowledged.

[Endorsed]: Filed August 18, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the first day of September, 1949, before the Court sitting without a jury, Joseph B. Abrams, Esq., M. S. Huberman, Esq., and Leonard J. Bloom, Esq., appearing as attorneys for plaintiff, and Alex Arguello, Esq., and Marvin Giometti, Esq., appearing as attorneys for defendant. Evidence both oral and documentary having been introduced, and the cause submitted for decision, this Court finds the facts and states the conclusion of law as follows:

Findings of Fact

I.

Plaintiff Jack E. Molesworth is a citizen of the State of Massachusetts, and defendant is a citizen of the State of California, residing in the Northern District of California. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00).

II.

On October 30, 1948, and on March 5, 1949, and for a long period of time prior to October 30, 1948, plaintiff Jack E. Molesworth was, and now is, engaged in the business and occupation of philatelic broker and stamp dealer at Boston, Massachusetts, and at all times herein mentioned, said plaintiff enjoyed a good name and reputation as such.

III.

Defendant Stephen W. Gerber on said dates and for a long period of time prior thereto wrote a column entitled "Pets & Peeves" in a weekly magazine known as "Weekly Philatelic Gossip". On or about October 30, 1948, defendant Stephen W. Gerber wrote in said column and caused to be published by said magazine, in Vol. 47, No. 9, Whole Number 1408, page 283 thereof, the following words of and concerning plaintiff Jack E. Molesworth:

"What's A Mole Worth? Actually nothing, unless you skin it. The mole is a darn nuisance that burrows blindly and aimlessly until trapped. The philatelic species runs true to form as a bore and a nuisance. Sometime ago, he slipped the trap by disclaiming responsibility for substituting No. 460 for No. 478 in a sale. He professes to be a "Philatelic broker" who has apparently been carrying on his limited operations at the expense of the large stamp auction houses. Quoting from a few of the reports we learn that, "His returns have always been late and excessive . . . If he doesn't sell them, he returns the stamps." Another report tells us that, "He practically returns about 90% of the lots and they have all taken him off their list. We are doing likewise." Another auction house quotes their experience to the effect that the mole returned \$270 from a total of \$300, after holding the property between two and three months. He justified the delayed returns with the unreasonable claim that the lots were not as described. From the informa-

tion furnished to us it seems that he has operated at the auction houses' expense. He'd chisel on the lots by offering them for sale. If unsuccessful, they would eventually be returned, long after settlement date. This type of operation is a new and clever angle: as long as it can be carried on. But the gravy train is grinding to a stop and it's a painful fact that the mole's worth will have to be tested in a different racket—maybe going to work for a bank or something.

IV.

On or about March 5, 1949, defendant Stephen W. Gerber wrote in said column and caused to be published by said magazine in Vol. 48, Number 1, Whole Number 1426, page 11 thereof, the following words of an concerning plaintiff Jack E. Molesworth:

Gather Around, Dear Reader and enjoy the funniest story ever told. It furnishes proof positive that reporting stampic shenanigans is a risky vocation; especially, when a few gents are allergic to publicity. *Pets and Peeves* (October 30, 1948) published an item under the heading, "What's A Mole Worth?" Although no name was mentioned, a part-time Boston dealer named Jack E. Molesworth figured out that the shoe fit. So-o-o, said J. E. M. has filed a libel action against us for a paltry \$150,000.00 to assuage his financial hurt as an upright, honest, unimpeachable and expert stamp dealer. (Don't laugh yet.) If selling a counterfeit stamp, if misrepresenting a stamp cataloguing at \$40.00 as

being one catalogued at \$55.00, if unreasonable demands and claims, if allegedly unsatisfactory auction settlements—if IF IF IF all of these are the distinguishing characteristics of an upright, honest, unimpeachable and well-informed stamp dealer, then we apologize. (Laughter, please.) We are reminded of one of several libel suits in recent years. A bozo sued Drew Pearson for libel. When the case was tried, Pearson proved the “libel” and the bozo landed in the klink. When he saw the light, it was filtered through iron bars. We have two pertinent opinions, (1) this J. E. M. is being used as a tool to intimidate us in our fight for decency in philately, (2) this J. E. M. won’t dare to bring the case to trial.

V.

Said “Weekly Philatelic Gossip” is a national stamp magazine published weekly at Holton, Kansas. Said magazine is sold and distributed throughout the United States, to stamp collectors, stamp auctioneers, and other persons interested in philately.

VI.

Said publications, and each of them, were and are false and defamatory. Said publications, and each of them, exposed, and now expose, plaintiff Jack E. Molesworth to hatred, contempt, ridicule and obloquy, and said publications, and each of them, had, and have a tendency to injure plaintiff in his business and occupation of philatelic broker and stamp dealer.

VII.

Said publications, and each of them, caused plaintiff Jack E. Molesworth, great mental anguish and suffering, and said publications, and each of them, injured plaintiff in his said business and occupation of philatelic broker and stamp dealer.

VIII.

Said publications, and each of them, were known by defendant Stephen W. Gerber to be false at the time he made the same, and said defendant did not have probable or any cause for believing the same to be true. Said publications and each of them were made by defendant Stephen W. Gerber maliciously and for the purpose of injuring, disgracing and defaming plaintiff Jack E. Molesworth and interfering with his business and occupation of philatelic broker and stamp dealer.

IX.

Said publications, and each of them, were made by defendant Stephen W. Gerber because of a private controversy or business dispute with plaintiff Jack E. Molesworth. Subsequent to said publication of October 30, 1948, and prior to said publication of March 5, 1949, plaintiff Jack E. Molesworth asked defendant Stephen W. Gerber for the opportunity to demonstrate to him the falsity of said publication of October 30, 1948, but defendant Stephen W. Gerber refused to give plaintiff the opportunity to do so, but on the contrary wrote and caused to be published said publication of March

5, 1949. On November 8, 1948, plaintiff Jack E. Molesworth demanded a retraction of said publication of October 30, 1948, from defendant Stephen W. Gerber, but said defendant refused to retract the same. At all times herein mentioned, defendant Stephen W. Gerber has asserted that said publications, and each of them, were true and correct, whereas said defendant knew the same to be false and untrue. At no time herein mentioned did defendant Stephen W. Gerber make due or proper investigation of the truth or falsity of the statements made in said publications.

X.

Said publication of October 30, 1948, and said publication of March 5, 1949, and each of them, are libelous per se.

XI.

The Court finds that plaintiff Jack E. Molesworth has sustained general damages in the sum of Three Thousand Dollars (\$3,000.00) on account of said publications, and that punitive damages in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00) should be assessed against defendant Stephen W. Gerber.

Conclusions of Law

1. That this Court has jurisdiction of this cause;
2. That plaintiff Jack E. Molesworth recover against defendant Stephen W. Gerber general dam-

ages in the sum of Three Thousand Dollars (\$3,000.00);

3. That plaintiff Jack E. Molesworth recover against defendant Stephen W. Gerber punitive damages in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00);

4. That Plaintiff Jack E. Molesworth recover against defendant Stephen W. Gerber his costs incurred herein.

Judgment is hereby ordered to be entered accordingly.

Dated this 22nd day of November, 1949.

/s/ LOUIS GOODMAN,
United States District Judge.

Receipt of Copy Acknowledged.

Lodged November 12, 1949.

[Endorsed]: Filed November 23, 1949.

In the United States District Court for the Northern District of California, Southern Division

No. 28610G

JACK E. MOLESWORTH,

Plaintiff,

vs.

STEPHEN W. GERBER,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 1st day of September, 1949, before this Court sitting without a jury, Joseph B. Abrams, Esq., M. S. Huberman, Esq., and Leonard J. Bloom, Esq., appearing as attorneys for plaintiff, and Alex Arguello, Esq., and Marvin Giometti, Esq., appearing as attorneys for defendant. Evidence both oral and documentary was introduced and the cause submitted for decision, and this Court being fully advised in the premises, made its Findings of Fact and Conclusions of Law.

It Is Therefore Ordered, Adjudged And Decreed as follows:

(1) That plaintiff Jack E. Molesworth do have and recover of and from defendant Stephen W. Gerber general damages in the sum of Three Thousand dollars (\$3,000.00);

(2) That plaintiff Jack E. Molesworth do have and recover of and from defendant Stephen W.

Gerber punitive damages in the sum of Seventy-five Hundred Dollars (\$7500.00) ;

(3) That plaintiff Jack E. Molesworth recover from defendant Stephen W. Gerber his costs incurred or expended herein in the sum of \$.....

Dated: December 2nd, 1949.

/s/ LOUIS GOODMAN,
United States District Judge.

Approved as to form, as provided in Rule 5 (d).

/s/ LEONARD J. BLOOM,
/s/ M. S. HUBERMAN,
Attorneys for Plaintiff
Jack E. Molesworth.

Approved as to form, as provided in Rule 5 (d).

ARGUELLO & GIOMETTI,
Attorneys for Defendant
Stephen W. Gerber.

Entered in Civil Docket Dec. 2, 1949.

Receipt of Copy Acknowledged.

[Endorsed]: Filed December 2, 1949.

In the Southern Division of the United States District Court for the Northern District of California

No. 28,610-G

JACK E. MOLESWORTH,

Plaintiff,

vs.

STEPHEN W. GERBER,

Defendant.

Before: Hon. Louis E. Goodman,
Judge.

REPORTER'S TRANSCRIPT

Thursday, September 1, 1949

Appearances:

For the Plaintiff:

LEONARD J. BLOOM, ESQ.

JOSEPH ABRAMS, ESQ.

JEROME SACK, ESQ.

For the Defendant:

ALEX ARGUELLO, ESQ.

MARVIN GIOMETTI, ESQ.

* * *

In paragraph 4, if Your Honor please, of this original complaint, we set forth that this Weekly Philatelic Gossip is sold and distributed throughout the United States to stamp dealers, stamp collectors, auctioneers, and other persons interested in phi-

lately. That paragraph is admitted, if Your Honor please, in the answers which have been filed, so we have here an admission that the magazine is circulated everywhere in the United States and that it is directed and distributed primarily to people engaged in or interested in the stamp business. [3*]

* * *

JOSEPH B. ABRAMS

called as a witness on behalf of the plaintiff; sworn.

The Clerk: State your name, please.

A. Joseph B. Abrams.

Direct Examination

* * *

By Mr. Bloom:

Q. Will you give us your educational background and experience in the stamp business?

A. Well, as I say, I graduated from Harvard College and Harvard Law School. I have been special counsel for the Commonwealth of Massachusetts under three bank commissioners. As far as my stamp collecting activities are concerned, I have been a collector since I was a boy. I have been a serious collector for about a dozen years, and by serious collector of stamps, it means one who collects the more valuable stamps and is a substantial collector.

I am personally familiar with all the airmail dealers in the United States. There are only a few

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Joseph B. Abrams.)

of them who specialize in airmail, and I have a practically complete collection of airmail of the world except for the newer rarities. I am a collector of United States stamps, and I have perhaps 50 or 60 albums of stamps in covers in my collection. I know the Boston dealers and some of the collectors. I know the New York dealers and auction houses and I have been a purchaser in auctions and from dealers and from other collectors, as I say, seriously for at least a dozen years. [14]

* * *

Q. (By Mr. Bloom): Will you tell us how the stamp business is conducted?

A. Eliminating what I don't consider of any consequence in the stamp business, such as selling and buying stamps as they come out—in philately we call it "postoffice"—and confining myself to the serious business of stamp collecting, I would state that the stamp business in the United States is concentrated in the hands of relatively few dealers and auction houses. There are relatively few collectors, out of the 140,000,000 people in the United States, substantial collectors, that is, collectors that run into the thousands. The ordinary method of selling stamps—

* * *

Q. (By Mr. Bloom): Now, Mr. Abrams, will you briefly tell us the manner in which the stamp business is conducted?

A. The ordinary method of selling stamps in-

(Testimony of Joseph B. Abrams.)

volving the rich and valuable collections is by auction sale. These auctions are held, for the most part, in New York City. The business is [16] concentrated in the hands of perhaps a dozen large auction houses in New York City. There are two or three auction houses in Boston. There are scattered auctions held throughout the country. There is one house in Philadelphia that runs auctions. The large and valuable collections, like the Roosevelt and Ickes collections, were sold by auction houses, out of an auction house in New York City. They call a sale of issues. A catalogue is prepared wherein each stamp is given a number out of the official stamp catalogue, which is known as a Scott's Catalogue.

Every stamp—and I am limiting myself to the United States stamps—every stamp is given a number. No. 1 would be the five cent of 1847. No. 2 would be the ten cent of 1847. Those were the first stamps made in the United States for postage purposes. So on down the line by year, numbers added from year to year, and they pile up, probably 23 new issues, or thirty new ones added, so that at the present time we have altogether 950 or so stamp collections of legal postage.

These large auction houses sell by sending perhaps 1500 catalogues to 1500 serious collectors in the United States. Sale is by description in a catalogue. Ordinarily, the purchaser or bidder does not see the stamp, unless photographs of the more rare ones are with the catalogue. The method of description

(Testimony of Joseph B. Abrams.)

starts with "Superb," "Very fine," "Fine," "Very good," "Good." Some houses selling stamps call them "Average." [17]

The collector, wherever he may be in the United States, who gets a catalogue, sends a mail bid if he doesn't attend the auction, if he doesn't bid from the floor, he sends in a mail bid, and if his bid is the highest bid at that particular sale, he is awarded the stamp and it is sent to him. That is the way the auction business is conducted, and the most important thing in the entire stamp industry is the integrity of the auction house or dealer selling, so far as his description of the stamps is concerned, confidence in the auction house, because once the collector loses confidence in the integrity of the dealer, the dealer is lost, because everything is based on the integrity and honesty of the dealer in the business.

Another aspect of how stamps are sold and dealt in, you have stores. You might find a half a dozen stamp stores here in San Francisco, dealers selling stamps over the counter. People who are interested in collecting stamps, they can either buy from collectors or they themselves buy at auctions, so that the collectors are always bidding against the dealers themselves in the auction sales. And, again, integrity is the cornerstone of the entire stamp business. If a man comes in you didn't know, a dealer in San Francisco—I am only supposing—says, "I want to sell a 90 cent No 122, or an imperfect stamp," I have confidence in that dealer before I give him

(Testimony of Joseph B. Abrams.)

a hundred dollars for a number 122, because that is about the average price for that particular stamp. So I have a picture of the stamp in my [18] pocket, the catalogue showing \$1,000. That stamp may or may not be genuine, and I bought it because I have confidence in the person who sold it to me. I put it in the stamp catalogue for \$100 because I had confidence in him. I would not have bought that stamp from him if he did not have my confidence.

In general, finishing up this aspect of the case, all I can say is that the stamp business is concentrated in the hands of a relatively few people, and the slightest breath of suspicion will affect any dealer and is enough to ruin him in the eyes of the few serious collectors in the stamp field.

Q. What, if anything, has integrity to do with the purchase of stamps by a dealer or broker who is seeking stamps from others?

A. All I can say in answer to that, Mr. Bloom, is that it is like your San Francisco Bar Association. The lawyers get talking about a certain lawyer, something he did wrong, it is very bad for that lawyer. In the stamp business, if the dealers get talking about a dealer amongst themselves, those dealers won't do business with him. They will remove him from auctions. They won't accept his bids. If a dealer in the business gets a reputation of anything suspicious about him, he sends in bids and the auction houses disregard them, won't even write him a letter saying why his bids are never

(Testimony of Joseph B. Abrams.)

filled, because that dealer does not know and they don't explain that, just simply disregard him.

Q. You are familiar with the two articles which are the subject [19] matter of this action?

A. Yes, sir.

Q. In your dealings in the stamp fraternity, since the publication of those articles, have those articles been the subject matter of discussion in the fraternity? A. They have.

Q. Where have you discussed, or where have these articles been called to your attention, if any place?

A. At dealers' offices in Boston, and at the stamp convention that was held in Boston about three weeks ago.

Q. What type or branch of the business, members belonging to what branch?

A. Both collectors and dealers have discussed the Molesworth articles, as well as this case. They have created a great deal of comment and talk in the field. In fact, it has almost become a "cause celebre," if you will pardon the French, Your Honor. [20]

* * *

JACK E. MOLESWORTH

the plaintiff herein; sworn.

The Clerk: State your name to the Court, please.

A. My name is Jack E. Molesworth.

Direct Examination

By Mr. Bloom:

Q. Mr. Molesworth, where do you reside?

A. Boston, Massachusetts.

Q. Where were you educated?

A. I was educated at Park College, Parksville, Missouri; Tulane University, New Orleans, from which I received a Bachelor degree in Business Administration; subsequent to that graduated the school of business at Harvard where I received a master's degree in Business Administration cum laude.

Q. During part of the time you were a member, were you, of the armed forces?

A. Yes, I was. In fact, the education was coincident with the portion of the time that I was in the navy. I enrolled in the navy in July, 1943, was discharged from the navy September 3, 1946.

Q. How long have you been engaged in the stamp business in any capacity?

A. I would say since I ran my first ad in a magazine of national distribution in 1939.

Q. How old were you at that time?

A. I was 14 years old at that time. [27]

Q. How long have you been engaged in the—how long were you engaged in the business as a dealer?

A. Ten years.

(Testimony of Jack E. Molesworth.)

Q. How old are you now? A. 23 years old.

Q. During the time you were in school in Tulane University, were you engaged in the stamp business?

A. Yes, after I was discharged from the navy, I lived at Tulane University under a GI bill, which furnished \$65 a month, and at the same time I ran a stamp business to make up the difference in expenses from what the GI bill furnished and what was necessary for my expenses. That difference was approximately \$100 a month, which was furnished by the stamp business.

Q. Then you went to Harvard, is that correct?

A. Yes.

Q. You continued in the stamp business while you were studying at Harvard, is that correct?

A. Yes, I did. It also made up the difference in expenses at Harvard for 16 months.

Q. After you got out of Harvard, as I understand it, you continued in the business as a stamp dealer, is that correct? A. Yes, I have.

Q. You have continued in it up to the present time? A. That is correct.

Q. When you got out of Harvard University, you also engaged in [28] another occupation?

A. At the time I graduated from Harvard, I accepted a position with a Boston bank as manager of their credit department. The stamp business has been a part time enterprise, although actually the amount of time I have spent is roughly 30 hours a week as opposed to 40 hours a week in my main business.

(Testimony of Jack E. Molesworth.)

Q. Have you intended to make this your full time business?

A. It has been my intention for some years to eventually enter the stamp business on a full time basis once I have acquired sufficient capital to do it in the manner in which I desire to do it.

Q. As a matter of fact, you were a recipient of a government loan to help you to go into the stamp business, isn't that right?

A. That is correct; after I was discharged from the navy in September, 1946, I secured a \$2,000 GI loan from the Mercantile Bank & Trust Company of Kansas City, Missouri.

Q. Is there a balance due on that loan?

A. Balance of \$1,000 still due on that loan.

Q. During the year 1946—let's go back that far—what would you say the volume of your sales of stamps was in that year?

A. In excess of \$5,000 in 1946.

Q. What has it been by year since then?

A. In 1947 the volume of operation was in excess of \$15,000. In 1948 the volume of operation was in excess of \$20,000. And in 1949, to and including July of this year, the volume was [29] approximately \$11,000.

Q. Is it a general statement that the volume of business you have transacted in 1949 up to date is substantially the same or is it less in volume than in 1948?

A. It is slightly less in volume.

Q. And with the exception of that experience

(Testimony of Jack E. Molesworth.)

with this year, has your business been increasing or decreasing, an increasing or decreasing business?

A. My business was a rapidly expanding business prior to the publication of this article, no question.

Mr. Arguello: I ask that that go out as not responsive.

Mr. Bloom: Why not?

The Court: You said prior to this year, prior to 1949?

Mr. Bloom: Prior to 1949.

The Court: What is your answer to that? Yes?

A. Will you repeat it?

The Court: He wants to know if your business was a steadily expanding business prior to 1949.

A. Yes, it was.

Q. (By Mr. Bloom): Your business was expanding? Let's put it this way: Your business was expanding up to the date of the publication of this first article, which was in the latter part of October, or October 30th of 1948, is that correct?

A. That is true.

The Court: Do you have a place of business?

A. My business is entirely by mail. I deal from my residence.

Q. You deal from your home?

A. Which is quite customary in the stamp business in a number of cases.

Q. (By Mr. Bloom): In 1947 you were engaged in advertising and selling stamps to various dealers

(Testimony of Jack E. Molesworth.)

and collectors throughout the country, were you not?

A. Yes, I was.

Q. In that year you did some business with Mr. Gerber, the defendant in this action, isn't that right?

A. That is correct.

Q. Here is a letter dated October 31st, 1947, on stationery of the National Stamp Company, 1105 Russ Building, San Francisco, purporting to be signed by Stephen W. Gerber, and I will ask you if you received that letter on or about the date it bears.

A. Yes, I did.

Q. This letter states:

“Dear Mr. Molesworth:

I will sincerely appreciate having you send to me the very fine set of 397-400; the 463b block and the single of 478. Immediately upon receipt and examination, a check will go forward in payment. Cordially yours, National Stamp Company, Stephen W. Gerber.”

Is that the first stamp transaction you ever had with Mr. Gerber?

A. That is the first transaction, yes. [31]

Mr. Bloom: I now offer in evidence as Plaintiff's Exhibit first in order this letter.

(Thereupon letter of October 31, 1947, Gerber to Molesworth, was received in evidence and marked Plaintiff's Exhibit No. 1.)

Q. (By Mr. Bloom): By the way, showing you this article written by Mr. Gerber in the October 30,

(Testimony of Jack E. Molesworth.)

1949, issue of Weekly Philatelic Gossip, where it refers to "some time ago he slipped the trap by disclaiming responsibility for substituting No. 460 for No. 478 in a sale."

I would like to ask you if that No. 478 referred to in this article is the same No. 478 as is referred to in the letter we have just introduced.

A. It is the same.

Mr. Arguello: I would suggest, before the answer is given, that the whole article be put in evidence.

Mr. Bloom: Let me do it my way.

Mr. Arguello: Rather than just putting in part of the article.

Mr. Bloom: We will get to the article momentarily. I want to identify that reference, is all.

Q. And showing you a letter dated November 13, 1947, from Mr. Gerber, I will ask you if you received that as part of this transaction on or about the date it bears. A. Yes, I did. [32]

Mr. Bloom: This letter, Your Honor, says:

"We return the stamp herewith which you specify as No. 478. We are inclined to think that this is classified improperly and that it is actually No. 460.

Cordially yours, National Stamp Company,
Stephen W. Gerber."

I offer this in evidence as Plaintiff's Exhibit next in order.

(Testimony of Jack E. Molesworth.)

(Thereupon letter of November 13, 1947, Gerber to Molesworth, was thereupon received in evidence and marked Plaintiff's Exhibit No. 2.)

Q. (By Mr. Bloom): So as of that date, I take it, your relations with the defendant were cordial?

A. Yes.

Q. As expressed in these letters, is that correct?

A. Yes.

Q. You had no argument or trouble with Mr. Gerber? A. None whatsoever.

Q. Now, I show you what purports to be a circular dated may 17, 1948, which emanated from the National Stamp Company, Menlo Park, California, and I will ask you if you received on or about that date this circular from Mr. Gerber and his company.

A. Yes, I did. This is an auction catalogue of Mr. Gerber's National Stamp Company.

Mr. Bloom: I now offer this in evidence as Plaintiff's next in order, and call your attention to the fact that this circular says that, "These lots are offered for our own account [33] from probably the world's largest stock of United States Mint stamps." The words "the world's largest stock of United States Mint stamps" are underlined and in capitals.

* * *

Q. (By Mr. Bloom): Now, in response to that circular, did you tender some bids for stamps to Mr. Gerber?

A. Yes, I mailed him quite a number of bids in response to that [34] catalogue.

(Testimony of Jack E. Molesworth.)

Q. Were you the successful bidder?

A. I was the successful bidder on six of the lots upon which I bid.

Q. I show you a letter dated May 31st, 1948, signed Stephen W. Gerber, and ask you if you received that as part of the transaction we are now talking about.

A. Yes, this is his reply to my letter returning three of the lots since the lots were not in accordance with the description in the catalogue and, to my mind, had been misrepresented.

Mr. Bloom: This letter, if Your Honor please, states:

“Dear Mr. Molesworth:

I do not know whether your note of May 25th was intended to be facetious or if you are serious. The terms of our sale were clearly set forth and we have reason to believe that they are the most liberal terms ever employed in any auction.”

It ends,

“If your note was intended to be serious, please confirm this so that we may take your name off our list and not subject you to the terrible injustice of bidding our sales.” [35]

Q. (By Mr. Bloom): Referring to the taking of the deposition two days ago of Mr. Gerber, Mr. Gerber stated he received what he called a “nasty letter”—“very nasty letter” from Mr. Molesworth in reference to this transaction. You stated you

(Testimony of Jack E. Molesworth.)

would produce the letter at this time. Have you that letter?

Mr. Arguello: Yes, we have it, Your Honor. I will ask that you call the Court's attention to the date, Mr. Bloom, if you intend to introduce it.

Mr. Bloom: All right. This is the letter you called a "very nasty letter," Mr. Gerber?

Mr. Gerber: I considered it so.

Mr. Bloom: (Handing document to witness):

A. Yes, this is the letter I wrote.

Q. (By Mr. Bloom): This is your letter and you mailed that to Mr. Gerber? A. Yes.

Q. In reference to mis-descriptions which you believed he made? A. That is correct. [36]

* * *

The Court: Was there some article in this magazine at a prior time about this plaintiff?

A. The reference in there is to the 478; in other words, at that time I sent an apology to Mr. Gerber for what was an honest mistake, told him that the stamp had been bought as No. 478, the number as which I sold it. The auction was public. W. T. Politz—in my first reference I didn't make reference to his auction house. I said at a public auction. He replied I should not be holding back names, be specific, because he would like to make reference to it in his column. I sent him the name of the auction house, which was W. T. Politz & Bros. and subsequently [37] he made some reference in his column to the mistake of the auction house and some

(Testimony of Jack E. Molesworth.)

mention about a philatelic broker, which was myself. The reference, I don't think it was particularly derogatory.

The Court: Well, you have answered it.

Q. (By Mr. Bloom): I show you a letter from Mr. Gerber dated July 28, 1948. Do you identify that letter? A. Yes, I received this letter.

Mr. Bloom: This letter, Your Honor, is in connection with the same transaction.

The Court: What is the date?

Mr. Bloom: July 28, 1948.

“Dear Mr. Molesworth:

Your letter of July 22nd is an astonishing piece of effrontery. I do not want to do any business with you and will tell you the reasons because I still want to consider myself a gentleman,”

then there is some talk about the navy and so forth, and in, apparently, the defendant's handwriting, after talking about his sons being in the service, he puts this:

“And they wear uniforms only on duty. Through very perfunctory inquiries, I am willing to stake anything in the world on my reputation against yours. When I say things about someone, I never express just opinions—I have the facts. When you impugn my integrity, honesty or motives [38] without proof, you can

(Testimony of Jack E. Molesworth.)

judge for yourself what type of character that makes you.

Sincerely yours, Stephen W. Gerber.”

I offer this as Plaintiff’s exhibit next in order.

(Letter of July 28, 1948, Gerber to Molesworth, was thereupon received in evidence and marked Plaintiff’s Exhibit No. 6.)

Q. (By Mr. Bloom): Now, it was following this controversy, was it, that the first article which is the subject of this action was published in the Weekly Philatelic Gossip, is that correct?

A. That is correct.

* * *

Mr. Bloom: If Your Honor please, I offer in evidence as Plaintiff’s exhibit this publication, particularly referring to page 283 where this article appears.

(Thereupon Weekly Philatelic Gossip, October 30, 1948, issue, was received in evidence and marked Plaintiff’s Exhibit No. 7.)

Q. (By Mr. Bloom): Now, Mr. Molesworth, you read this article, did you, at the time or shortly after it first appeared, that is, [39] October 30th, 1948.

A. Yes. I am a subscriber to the Weekly Philatelic Gossip. When I read that column—

* * *

(Testimony of Jack E. Molesworth.)

Q. (By Mr. Bloom): Tell us what effect the reading of the article had upon you.

A. The full impact of it was terrific upon me. In fact, I was terribly upset, especially by the fact that the statements were completely untrue and had no foundation. Going further, I knew that this would have a drastic effect on my business, not only buying, but also selling stamps, especially the buying and selling of stamps through auctions, buy but can not sell——

Q. (By Mr. Bloom): To sum up, what was your state of mind after you read this article there? [41]

A. It made me highly nervous and also practically made me sick at the thought of what my parents would think, especially my mother, when she saw the article. She, my mother, is in very poor health, a very nervous person, and the shock of the article could be sufficient to kill her under proper circumstances.

* * *

Q. (By Mr. Bloom): In connection with this stamp No. 475, you have testified that that refers to a prior transaction mentioned in one of Mr. Gerber's letters, is that correct? [42]

A. Yes.

Q. That occurred sometime before, is that right?

A. Yes. [43]

* * *

Q. (By Mr. Bloom): Now, at the close of the last session, Mr. Molesworth, you were testifying as

(Testimony of Jack E. Molesworth.)

to the effect of this first article in the Weekly Philatelic Gossip upon you. Were you finished with your answer? A. No, I was not.

Q. Will you finish, please?

A. To this time since the publication of this libel, I have been subjected to considerable ridicule and chiding and kidding by dealers around the country. I would enter an office and it would be "How's the mole today?" "What's the mole worth?" References of that nature which naturally caused me bad feeling and mental tension.

Q. What effect, if any, has this publication had on your stamp business? [46]

A. In the two months prior to the publication of this libel, my auction purchases amounted to \$3200. After the publication of this libel, the last eight months, the total auction purchases were only \$6,000. I bid in approximately the same number of sales, same number of bids, approximately, and the same percentage of retail. I believe some of my bids were not recorded by virtue of that libel, and therefore I wasn't able to purchase the number of stamps I would have been able to purchase ordinarily. If I couldn't buy, I couldn't sell.

Q. What type of clientele do you sell your stamps to?

A. I sell my stamps to a high class, selective clientele, people who buy stamps for \$5.00 to \$1,000 each, leading doctors, lawyers, other business men in the United States.

(Testimony of Jack E. Molesworth.)

Q. It is a fact that in general, then, that clientele of that type would only purchase stamps of high quality and condition?

A. That is true. Except in very rare instances I handle only stamps in first class condition.

Q. And you hold yourself out as being an experienced dealer, don't you? A. I do.

Q. If there is anything wrong with the stamps you do sell anybody, or they claim that there was, there is a question about it, you take them back without question, is that right?

A. Every one of my retail customers has received written statements from me that I offer to take back—— [47]

The Court: Just answer the question yes or no.

A. Yes.

Q. (By Mr. Bloom): Mr. Molesworth, I show you a letter on your stationery dated November 8th and addressed to Mr. Stephen W. Gerber, Menlo Park, California, and I will ask you whether you sent that letter to Mr. Gerber on the date it bears.

A. I did.

Mr. Bloom: I will offer this in evidence, if Your Honor please, as Plaintiff's Exhibit next in order.

(Letter dated November 8th, Molesworth to Gerber, was thereupon received in evidence and marked Plaintiff's Exhibit No. 8.)

Q. (By Mr. Bloom): This letter was written after the first publication? A. Yes, it was.

(Testimony of Jack E. Molesworth.)

Mr. Bloom: If Your Honor please, I would like to read this letter.

The Court: What is the date?

Mr. Bloom: This is November 8, 1948:

“Dear Mr. Gerber:

“I have read with interest your references to me in your October 30th column in Gossip.

“That our recent personal controversy motivated them, I have no doubt, but in spite of the personal contempt that you may have for me, I still believe that you will have the decency to print a retraction if I can furnish [48] proof that that which you have written is untrue. With one exception you quote from letters received from others the basis for which is apparently some specific auction dealing or dealings which they purportedly have had with me.

“For your consideration, I offer the following facts: (1) As you should already know, the number 460 which you intimate I personally substituted for No. 478 was purchased by me in a Boston auction as No. 478 and sold as purchased. I can furnish the auction catalogue to prove it and a statement by the auctioneer that he took the stamp back and refunded my money when it became clear that it was probably not No. 478, though there still was some doubt about its correct identity.”

Q. By the way, you have brought, at my instance, the catalogue from that Boston dealer, have you?

A. I have.

(Testimony of Jack E. Molesworth.)

Q. Identifying it as No. what?

A. As No. 478.

Q. No. 478? And you have also brought a letter from that dealer explaining this transaction and his mistake in connection with it? A. I have.

Mr. Bloom (Reading): “(2) My returns have for the most part been made within three or four days of receipt, occasionally after a week, and once or twice after about ten [49] days, in which cases the delay was occasioned by the necessity of having several lots expertized, which were doubtful. If you could see my stock, you could easily see that every item I buy and do not sell is certainly not returned. In fact, I never sell an item before paying for it as a rule.”

Q. On my instance, you have brought from Boston all the invoices, all your books of account, all of your canceled checks covering transactions for the past two years, have you not?

A. I have.

Q. They are available in court for the inspection of counsel if he wants to see them, is that correct? A. That is correct.

Mr. Bloom: “(3) I have never returned as much as 90 per cent of the lots purchased in a sale, unless you wish to take your own sale wherein the return of \$191.00 item made the returns \$205.75 out of \$222.95. To the best of my knowledge, I get a catalogue from every major auction house in the country and not a single one has taken me

(Testimony of Jack E. Molesworth.)

off their list. I bid in most every sale held and have yet to have my bids refused, and with two exceptions have secured lots in every sale in which I have bid in the past four months.”

Q. In that connection, you have letters, have you not, from the leading auction houses in the country, addressed to you, [50] expressing satisfaction with the manner in which you do business?

Mr. Arguello: I will have to object to that.

The Court: Yes, it calls for the contents of a written document.

Q. (By Mr. Bloom): You have those letters in the courtroom, have you not? A. I have.

Q. They are available for the inspection of counsel?

A. That is correct, fourteen of them.

Q. They are from the leading dealers?

A. Fourteen leading auctioneers in the United States, in my opinion.

Mr. Bloom: “(4) At no time have I returned \$270 worth out of \$300 worth and never have I held items two weeks, let alone two to three months, as you state in your column.

“Now you will probably say that these denials are just so much hot air, but I can prove them. If you will state which auction houses have written you the letters you quote, I shall be most glad to furnish my auction invoice on which I have recorded the returns along with reasons, plus my canceled dated check showing the date returns were

(Testimony of Jack E. Molesworth.)

made. I can immediately disprove your last \$300 reference in this manner if you will but give me a chance.

“There is no doubt but what my standards are rigid, [51] but there is not one of the better NYC auction houses such as Harmer, Rooke; Lawrence & Stryker; John Fox; Edson Fifield; Irwin Heiman, or Eugene Costales, that will not give you a good report on me. Likewise, any of the Boston auction will tell you that I am a major buyer and a valued customer. They even held up the starting of the Pollitz and Paige auction since I had not yet arrived.

“Will you favor me with a chance to disprove your accusations by furnishing me with your sources, so that I can send you the facts?”

“Sincerely yours, Jack E. Molesworth.”

* * *

Q. Now, in response to the letter which was just introduced in [52] evidence, you received from Mr. Gerber, did you not, this letter dated November 19, 1948?

A. Yes, I received this letter in reply.

Q. This was also received after the first publication but before the second publication, right?

A. That is correct.

* * *

Q. At the same time you sent that letter of November 8 to Mr. Gerber you also sent a letter, did you not, to the publisher of *Weekly Philatelic Gossip*?

(Testimony of Jack E. Molesworth.)

A. The editor of Weekly Philatelic Gossip.

Q. Who is that editor? A. Harry Weiss.

Q. And you requested a retraction from the publication on account of that first article, did you not? A. I did.

Q. I show you a copy of the letter in which that request is [53] made dated November 8, 1948, and I will ask you if that is the letter in which you requested the retraction.

* * *

The Court: Are you going to offer the second publication?

Mr. Bloom: Yes.

The Court: Any objection?

Mr. Arguello: No, Your Honor.

The Court: Mark it, then.

(Letter dated November 8, 1948, Molesworth to Weiss, was thereupon received in evidence and marked Plaintiff's Exhibit [54] No. 10.)

Mr. Bloom: Now, in this second article that appeared in March, 1949, that commences:

“Gather Around, Dear Reader, and enjoy the funniest story ever told.”

There is a statement in here, I want to get this correctly, that says, “So-o-o, said J. E. M. has filed a libel action against us for a paltry \$150,000 to assuage his financial hurt as an upright, honest, unimpeachable and expert stamp dealer.

“Don't laugh yet. If selling a counterfeit stamp,

(Testimony of Jack E. Molesworth.)

if misrepresenting a stamp cataloguing at \$40 as being one catalogued at \$55, if unreasonable demands and claims, if allegedly unsatisfactory auction settlements—If, If, If, If all of these are distinguishing characteristics of an upright, honest, unimpeachable and well informed stamp dealer, then we apologize. (Laughter, please.)”

Q. In connection with that reference to the \$40 stamp as being one catalogued at \$55, I am going to ask you if that does not refer again to that No. 478 and No. 460 controversy from the stamp you originally bought from Mr. Gerber and which was the subject of comment in the first article, is that right?

A. That is right.

Mr. Arguello: Counsel, he sold it to Mr. Gerber. You said bought.

Mr. Bloom: I beg your pardon. [55]

Q. That is the same stamp?

A. That is the same stamp, stated in a different way.

Q. That is the catalogue prices listed in Scott's, is that right?

A. Yes, Scott's Catalogue.

Q. He has also in this article, “If selling a counterfeit stamp——,” to shorten this record, I believe you know now what he has reference to there, have you not?

A. Yes, I believe I do.

Q. You have, as a matter of fact, the stamp in question in the courtroom in reference to a transaction with a dealer named Fox, is that cor-

(Testimony of Jack E. Molesworth.)

rect? A. Through an intermediary, yes.

Q. Through an intermediary named Larry Borenstein? A. That is correct.

Q. You have in your possession in the courtroom letters showing how the mistake was made in connection with that stamp and returning to Fox what money he had paid Borenstein for this stamp, is that right? A. That is right.

Q. By the way, what kind of stamp does he refer to as a counterfeit stamp?

A. It is a Confederate stamp, per catalogue number 8. It is a two cent red brown. I have the stamp on the table there.

Q. Would you mind getting it? Will you show His Honor the [56] so-called "counterfeit" stamp that you sold?

A. (Handing article to the Court.)

Q. Have you got one that does not bear the cancellation mark that this does?

A. May I explain?

Q. Explain to His Honor what that is about.

A. This stamp is genuine, Your Honor. It is not a fake. The cancellation on top of the stamp has been stated to be a fake by the best known experts in Confederate stamps. This stamp was sold through Larry Borenstein to John A. Fox, the leading dealer in Confederate stamps in the United States. Mr. Fox bought the stamp with the express understanding that if it wasn't genuine it could be returned.

(Testimony of Jack E. Molesworth.)

Mr. Arguello: I object to this.

The Court: Yes.

A. It can be proved, sir.

Mr. Arguello: I ask that that go out.

The Court: Yes, don't make statements.

A. Mr. Fox kept this stamp for five or six months, inserted it in an auction sale January 31st, 1949. The stamp would have been sold at auction had not an expert——

Mr. Arguello: I object to this testimony. He has no knowledge directly what would have happened to the stamp.

Mr. Bloom: I have documentary evidence. I am trying to connect this up. [57]

Mr. Arguello: Documentary evidence is as hearsay as the testimony.

The Court: I think you are anticipating, Mr. Bloom.

Mr. Bloom: Perhaps I am.

The Court: You are just piling up unnecessary evidentiary matter that it would be the burden of the defense to prove.

Mr. Bloom: Very well. The only reason I did this was the fact that I thought some of these reasons to somebody who wasn't familiar with the facts wouldn't make sense. However, I think your suggestion is well taken and we will wait until rebuttal to bring in these matters.

I now offer in evidence a third issue of *Weekly Philatelic Gossip* dated July 22, 1949, in which

(Testimony of Jack E. Molesworth.)

there was another reference and I offer it particularly on the question of continued malice.

(Thereupon Weekly Philatelic Gossip dated July 22, 1949, was received in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. Bloom: This article in *Pets and Peeves* starts off with the statement, "Molesworth to Dworak to Gerber. He's diddled it and put the ball into play again."

To save time, Your Honor can read the balance of that reference. That is all.

Cross-Examination

By Mr. Arguello:

Q. Mr. Molesworth, you stated you are employed by a bank, is that correct? [58]

A. That is correct.

Q. What was the name of that bank?

A. Rockland Atlas National Bank, Boston.

Q. What is your capacity there?

A. I am manager of the credit department, in training for junior loan officer.

Q. How many persons are there in the credit department?

A. In the credit department proper there are three people. I also have charge of the commercial service department which employs two.

Q. You are training for a higher position, is that correct? A. That is correct.

Q. That of junior loan officer? A. Yes.

(Testimony of Jack E. Molesworth.)

Q. How long is the ordinary bank training period to work up to that position?

Mr. Bloom: I don't know what that has to do with this action.

Mr. Arguello: I think it has a great deal. This boy is working up in a bank. It is obvious. He has already testified to it.

The Court: He has testified he works in a bank.

Mr. Arguello: He has also testified he is in training in the bank, working up to a better position in the bank. He also testified it is his desire to be a stamp dealer at the same [59] time. He is going to be one or the other, although he has no opinion as to one or the other. He comes into this court and states he is a stamp dealer, and he comes in and also says he is fully employed in a bank and working up in the bank. I am merely trying to determine what the true facts are.

Mr. Bloom: They are both true. They are not inconsistent.

The Court: I can't see that it makes much difference.

Mr. Arguello: I think it would have a bearing on the question of damages, Your Honor. I will withdraw the question.

Mr. Giometti: In that connection, Your Honor, I have a suggestion. I think there is also a question as to just what his capacity is. If, for example, Mr. Molesworth does not have the position of a stamp dealer and that position is just a hobby,

(Testimony of Jack E. Molesworth.)

for example, then of course he will have to show special damages, and in failing to do so there can be no recovery, so I think this whole question as to his occupation and his background——

The Court: You can question him as to how much time——

Mr. Bloom: Certainly.

The Court: ——the nature of his business, but how much training he got in the bank, I don't see is material. Sustain the objection to the last question.

Q. (By Mr. Arguello): Mr. Molesworth, you put in, as you testified, 40 hours a week in the bank?

A. That is for which I am paid. Actually it is nearer 30 [60] hours.

Q. And your training, does that consist of any extra time? A. None whatsoever.

Q. I see. In other words, the bank training totals this 40 hours for which you are paid?

A. That is correct.

Q. In addition to that time, you testified that you spent 30 hours on your stamp business?

A. That is correct.

Q. That is 70 hours a week you spend in working on stamps or in the bank?

A. 30 and 30 are 60 hours a week.

Q. You testified you got paid for 40.

A. That is correct. I am not on an hourly basis. I am paid by the week.

(Testimony of Jack E. Molesworth.)

Q. I see. You testified you started dealing in stamps as a stamp dealer when you were 13, is that correct?

A. I believe I said I was 14.

Q. You said you had been in business ten years and are 23 today, is that what you said?

A. Depends on where you start it and end it.

Q. At 14 how did you handle your business? Did you buy and sell nationally at that time?

A. Yes, I did, on a very small scale.

Q. Did you bid in national auctions, national auction sales, at [61] 14?

A. Yes, I bid in one sale.

Q. Did you get stamps at that sale?

A. Yes, I bought stamps at that auction.

Q. Did you have any trouble qualifying as a bidder at 14 years old?

A. None whatsoever. My age wasn't brought into the matter. My references were satisfactory.

Q. As a matter of fact, you have a personal stamp collection, do you not? A. I do not.

Q. Did you have one at 14? A. I did.

Q. When did you sell that personal stamp collection?

A. I believe the collection was sold some time between 1940 and 1943. The exact time I do not know. It wasn't, as I recall, sold as a collection, but was broken down into stock, I think.

Q. You testified you were in the navy for a period of time. While you were in the navy, you carried on your stamp business, did you?

(Testimony of Jack E. Molesworth.)

A. I bought and sold very little except during the year 1944.

Q. You did carry on the stamp business while you were in the navy? A. Yes. [62]

Q. As a practical matter, you went to considerable stamp conventions while you were in the navy?

A. No, I went to only one stamp convention while I was in the navy.

Q. That was in Chicago?

A. That is right.

Q. You bought and sold in that? A. I did.

Q. You were in the navy?

A. I was on terminal leave. I had been separated at the time.

Q. You were in uniform at the time, though?

A. That is correct.

Q. You testified your income from stamps in 1948 was \$20,000. That was your volume, wasn't it?

A. That is correct.

Q. You didn't mean to imply you made \$20,000 from stamps in 1948? A. No, I didn't.

Q. What do you think your income from stamps in 1948 amounted to?

The Court: You mean net?

Mr. Arguello: Net income, Your Honor.

A. In the year 1948 the net income, I would say, was approximately \$2500. [63]

Q. (By Mr. Arguello): Do you think it was more or less?

(Testimony of Jack E. Molesworth.)

A. Approximately that amount. Could have been more, could have been less.

Q. In 1947 you testified that your volume was \$15,000. What was your net in 1947?

A. It would be roughly \$1500, I would say. The determination—may I explain it?

Q. Yes, go ahead.

A. The determination of income is strictly dependent on how one values the inventory, Your Honor.

Q. At the time and skipping all this preliminary questioning, Your Honor, with regard to when these two people met, in the interest of time, and getting to the sale of 460 and 478, how are those stamps distinguished, Mr. Molesworth?

A. The stamps are distinguished by the watermark, the absence in one case and the watermark being there in the other case.

Q. When you sold a stamp of a type that has but one distinguishing characteristic, in the conduct of your business were you, or did you, usually make a check—

A. Very definitely.

Q. —as to the characteristic?

A. Very definitely.

Q. I see. Did you make a check in this instance?

A. I believe after purchasing at auction I did, because that is my customary procedure. [64]

Q. However, the stamp went out and was not

(Testimony of Jack E. Molesworth.)

the stamp you represented it to be, is that correct?

A. That fact is not definitely established, but an expert has stated that in his opinion, it was 460 and not 478 as it was sent out.

Q. So far as you know, the stamp was not the stamp you represented it to be, is that correct?

A. That is correct.

Q. Now, you sold the stamp to Mr. Gerber for a profit? A. Yes.

Q. You were holding yourself out as a stamp dealer at the time? A. Yes, I was.

Q. In the purchase and sale of stamps in the conduct of the business that you have on the side, what is your ordinary procedure as to the purchase of stamps?

A. Will you be more specific? I don't understand.

Q. What check do you do with regard to the stamps you buy?

A. I check the cancellation for soundness. That generally in a stamp is the only thing of significance. The fact that there may or may not be a fake in the United States stamps is a risk which very seldom ever comes about. United States stamps as a general rule are not faked. It is practically an impossibility.

Q. Would the cancellation—

A. Cancellation can be faked. The stamp in question was a [65] Confederate stamp, which is different from United States stamp.

(Testimony of Jack E. Molesworth.)

Q. Do you refer, however, to reference sources with regard to the identification of the various stamps?

A. Generally I need not refer. I have that within my own philatelic knowledge.

Q. However, of course you missed on these?

A. That is right; well, with a check for watermark.

Q. Did you do that in that case?

A. I said I thought I did, yes.

Q. As a practical matter, checking watermarks is a very simple operation, is it not?

A. The operation is simple, but the determination of watermark in many cases is not.

Q. You have a little set there with you, don't you?

A. Yes, sir, I do.

Q. Will you show the Judge what that is? It is a little tray on which a stamp is placed, benzine or some other liquid like benzine, placed on the back of the stamp and the watermark shows up. Now, in the inspection of a stamp and checking the identities you state that that matter is often within your own knowledge, is that correct?

A. That is correct.

Q. However, there are stamps you have to make reference to a source material for, is that it?

A. Occasionally, yes. [66]

Q. We will talk about this No. 207, Confederate. This stamp was sold by you to John A. Fox, you testified.

(Testimony of Jack E. Molesworth.)

A. No, the stamp was sold to Fox by Larry Borenstein who had my material on consignment.

Q. It was your stamp?

A. It was my stamp.

Q. Did Borenstein get any profit from the sale?

A. A small profit, yes.

Q. He sold it at the price you wanted, didn't he?

A. That is not correct. The stamp was sent him at a price. He got a small profit, only about a dollar.

Q. Before the sale of that stamp, did you check it? A. Yes, I checked it.

Q. How did you check it?

A. I checked it by reference to Scott's U. S. Specialized Catalogue. In that catalogue under "Confederate Stamps" you will find cancellation imprinted on the page.

Q. Did you feel you had adequate reference material to properly check this stamp at the time you checked it?

A. There is reference material which would have been of value which I did not have.

Q. But you felt at the time that you checked it—

A. May I explain my location at the time this came about? I was on an island in a lake in New Hampshire at the time this came about. Reference material was not readily available. [67]

Q. You were carrying on your business as a stamp dealer, though? A. That is correct.

(Testimony of Jack E. Molesworth.)

Q. Holding yourself out as a stamp dealer?

A. I did and still do.

Q. In regard to the general policy of selling a stamp, and especially in this high class clientele you referred to, do you take the responsibility for seeing that stamp is a good one or do you sell to the buyer at his own risk?

A. I sell stamps that, to the best of my knowledge, the stamp is genuine and I will take it back if it is ever determined otherwise any time within my lifetime.

Q. However, you want your clients to trust you? You want them to rely on you as selling them valid merchandise, is that right? A. I do.

Q. And you hold out anything you sell to them as an all right stamp? A. I do.

Mr. Arguello: I am going to ask about this letter (handing to counsel). This is a copy, Your Honor. I have made a demand upon plaintiff's counsel for the production of the original, which they have not done.

Mr. Bloom: Wait a minute. You haven't asked me for the original. [68]

Mr. Arguello: Excuse me. Do you have the original?

Mr. Bloom: I have the original. I don't think it is in as good condition as that copy, but I don't want you to give the Court the idea I am refusing to give you the original, if I have it. No, I guess I have another copy. I beg your pardon. That

(Testimony of Jack E. Molesworth.)

was sent to Borenstein. I just have another copy. I wouldn't have the original of that.

The Court: Is there an objection to this letter?

Mr. Bloom: No objection.

The Court: All right.

Q. (By Mr. Arguello): I call your attention to this letter that you wrote to John Fox, copy going to Larry Borenstein. Is that the letter you wrote?

A. That is the letter I wrote.

Mr. Arguello: I would like to introduce this as Defendant's exhibit.

(Letter, Molesworth to Fox, was thereupon received in evidence and marked Defendant's Exhibit A.)

Mr. Arguello: I would like to refer to it. If you prefer, I will read the whole thing.

The Court: Whatever you wish.

Mr. Arguello: It is addressed to Mr. John A. Fox, 116 Nassau Street, New York 7, New York.

The Court: What date, please?

Mr. Arguello: February 28, 1949. [69]

(Reading Defendant's Exhibit A.)

Q. Mr. Molesworth, at the time of this sale you felt that Mr. Fox should have checked this stamp he bought from Larry Borenstein right away, is that correct?

A. That is correct, since he bought it with that understanding.

(Testimony of Jack E. Molesworth.)

Mr. Arguello: I will ask that the last part of that answer go out as not responsive.

Mr. Bloom: I will ask it stay in. That is responsive.

The Court: You ask him if he felt something, and that always opens the door, I think. It makes no difference. Let it stand.

Q. (By Mr. Arguello): You stated that he should have had his own expert check it after he bought it from you, is that correct?

A. That is correct.

Q. Do you feel that way when you sell stamps to general clientele?

A. No, sir, I do not. In this case there was a doubt. That is the reason the express understanding was made, and Mr. Fox is supposed to be an expert in his own right.

Q. It seems to me most stamp collectors set themselves up as experts.

A. Very few do. [70]

* * *

Q. Have you noticed, incidentally, in your experience and in your dealing with other dealers, any falling off generally in [71] the philatelic business in the last year?

A. No more so than 1947, no.

Q. You say that the level of business is about the same in 1947, 1948 and 1949?

A. That all depends on the individual dealer. I

(Testimony of Jack E. Molesworth.)

would have to see the records of the dealers to determine whether business has fallen off.

Q. I ask you if you have discussed it in your talks with stamp dealers. A. Yes, I have.

Q. I asked you if you have received the general impression in the course of doing so there is a falling off.

Mr. Bloom: I object to that as speculative, calling for a vague answer and a matter of opinion.

Mr. Arguello: I think it is a subject always discussed by business men.

Mr. Bloom: I know, but you are asking for hearsay. You are asking for a conclusion, namely, the state of the business based on hearsay, that is what that calls for.

A. I would be glad to answer the question.

The Court: Well, let him answer it then.

A. Stanley Gibbons, one of the largest dealers in the United States, has published a statement his volume is considerably in excess of 1943 during the year 1948. It is the only published statement I have seen, and that has been run in several places. He has told me that personally. I mean, 1949 is higher than 1948.

Q. Did he say anything about 1947 and 1948?

A. No, 1947 was not discussed.

Q. Have you noticed any falling off in your own business—withdraw that. Referring again to values, has there been any depreciation in the values of stamps in the last year, let's say, that you have noticed?

(Testimony of Jack E. Molesworth.)

A. In the last year? Not particularly so.

Q. The last two years?

A. More so, yes. Since 1946 some stamps have declined quite a bit, speculative items; others have declined only about 10 per cent. The quality merchandise I handle is in the latter category. [73]

* * *

Q. In the purchase of and in the operation of your business you testified that you buy at many auctions and from many dealers. Did you ever buy any stamps from Hy Bedrin, New York?

A. Yes, I have.

Q. Did you buy any stamps from him in November, 1947? Check your books, if you like. [75]

A. I would like to.

Mr. Bloom: I don't know what the materiality of this is. It doesn't seem within the scope of the direct examination.

The Court: I don't know what it is he has in mind, although I expect it would be harmless, this particular question would be harmless as to whether or not he bought any stamps. He may be laying a foundation for something.

Mr. Bloom: He may be.

The Court: It may subsequently appear to be objectionable or not within the issues. Are you able to answer the question?

A. Yes. No, I did not buy stamps of Hy Bedrin in November, 1947.

Q. (By Mr Arguello): Did you buy any stamps

(Testimony of Jack E. Molesworth.)

from him in December, January or February following that November?

A. Yes, I did in December.

Q. \$200 worth of stamps from him at that time?

A. No, I bought \$351.50 worth. That was the invoice value, that is.

Mr. Arguello: May I look at those invoices, please?

Mr. Bloom: Well, Mr. Arguello,—

Mr. Arguello: One of the statements he made—

Mr. Bloom: Wait a minute.

Mr. Arguello: —dealt with this \$300 purchase.

Mr. Bloom: You mean a statement Mr. Gerber made?

Mr. Arguello: No, a statement you questioned him about on [76] direct examination and he stated he didn't make a purchase of \$300 and returned \$270.

Mr. Bloom: All right. You are referring— These questions, I take it, refer to that statement of Mr. Gerber's in the article about purchase of \$300 and return of \$270, is that it?

Mr. Arguello: No, to the statement you asked about on direct examination, Mr. Bloom.

Mr. Abrams: Wasn't a purchase of \$300 because so far there is no purchase of \$300.

The Court: Are you trying to find out in this particular purchase how much the plaintiff returned?

Mr. Arguello: Yes.

(Testimony of Jack E. Molesworth.)

The Court: Can you recall whether or not you returned it?

A. Yes, I have the exact data.

The Court: How much of it did you return?

A. I purchased \$351.50 and \$274.15 was returned.

Q. (By Mr. Arguello): What was the purchase?

A. \$351.50 plus 60 cents postage and insurance. The returns were \$274.15.

Mr. Bloom: I take it, Mr. Arguello, this return——

The Court: Let's not, to save time, argue about it. It is a matter of no consequence. Suppose he did return them? Why do you object to it?

Mr. Bloom: I just wanted to see where it fits in the case.

Mr. Arguello: It is one of the allegedly libelous statements [77] in one of the articles.

The Court: That isn't the part of it that is apparently objectionable. I suppose anybody is entitled to return merchandise. What do your records show as to when you returned it?

A. The receipt was invoiced, dated December 19, 1947, presumably at the time they were made up in New York City. These were all sent to me from New York City. I was on a Christmas vacation at the time and there was the delay of the Christmas holidays, but my payment to them dated January 10, 1948, and according to my records, I did not actually receive these, or at least have opportunity to examine them until January of that year. Re-

(Testimony of Jack E. Molesworth.)

turns were made within ten days of my actually receiving for the purpose of doing business, not two to three months, as stated in the article.

* * *

Mr. Arguello: If the party feels that the article was printed believing it true by Mr. Gerber, I think that would have a bearing as to whether Mr. Gerber had actual malice or not.

The Court: I assume plaintiff wouldn't be in court if he had an opinion that the defendant was acting in good faith.

Mr. Arguello: He wrote a letter to that effect, Your Honor.

The Court: He did what?

Mr. Arguello: He wrote a letter to that effect. That is why I am asking the question.

Mr. Abrams: That is not exactly so.

Mr. Arguello: To an associate editor, as a matter of fact, [80] of *Weekly Philatelic Gossip*.

The Court: Go ahead.

Mr. Arguello: "Regarding myself and your fellow columnist, Gerber, we got into a personal argument this summer when he declined to take gracefully what was meant as constructive criticism of his *Gossip* column and some damaged and off-centered lots I got in a wholesale auction of his last spring. He proceeded to reflect on my integrity, though he knew nothing about me and my defensive replies (an offense is the best defense) in which I minced no words made him blow his top. About

(Testimony of Jack E. Molesworth.)

four months after my last letter to him, he came out in Gossip with a blast against me and my manner of auction buying, his information coming from some of the NYC boys whom I had verbally chastised for selling repaired, regummed, damaged, and out-and-out faked stamps. The catch is that he fell for their line without checking with me as he erroneously states his policy to be, and as a result printed charges which have no basis and are either completely false or a distortion of the truth. Actually he probably believes what he printed is the truth, but he'll have a rude awakening when he tries to prove it in court."

Q. Do you remember writing that?

A. Yes, I wrote that.

Q. "You know how I operated when we had weekly dealings and I have not changed, but rather, in my own way, carried on a [81] crusade against the shady ones, just as Gerber, and it is quite ironic that we should end up like this since we both are for the same thing."

Do you remember writing that?

A. Yes, I remember. [82]

* * *

Redirect Examination

By Mr. Bloom:

Q. Just one or two questions. By the way, this Larry Borenstein to whom you wrote that letter, who is he in relation to the Weekly Philatelic Gossip?

(Testimony of Jack E. Molesworth.)

A. He is an associate editor of Gossip and writes a column in Gossip occasionally.

Q. After these articles had been printed there was [88] correspondence between Mr. Gerber and Mr. Borenstein and you and Mr. Borenstein, was there not? A. Yes, that is correct.

Q. What was the purpose or reason for all of that correspondence?

A. Mr. Borenstein apparently was acting as a self-appointed intermediary to try and get the case dropped.

Q. As a matter of fact, you have a lot of correspondence here with Mr. Borenstein and copies of letters of Mr. Gerber's in reference to his acting as intermediary, do you not?

A. I do have, yes.

Mr. Bloom: Your Honor, I am not going to clutter the record with this correspondence, but I want to show from what context it is taken.

The Court: All right.

Q. (By Mr. Bloom): I show you one letter, however, from Mr. Gerber, on his stationery, addressed to "Dear Larry"—presumably Larry Borenstein—from Menlo Park, February 20, 1949, and I will ask if Mr. Borenstein sent to you that part of the letter that Mr. Gerber wrote to his associate.

Mr. Arguello: I will object to that because it assumes the fact that this letter was written by Mr. Gerber.

The Court: Yes. You needn't go any further

(Testimony of Jack E. Molesworth.)

with that. Have you anything showing this letter was actually written by Mr. Gerber? [89]

Mr. Bloom: I will put Mr. Gerber on the stand. It is on his stationery.

The Court: You could do that later.

Mr. Bloom: I thought he would agree to have it go in.

Mr. Arguello: I am not sure. Let's look at it. Possibly you can get it in.

Mr. Bloom: There is a statement in that last letter to Mr. Borenstein to the effect that—Well, I will read it; there is a sentence in here which says, "Actually he probably believes what he printed is the truth, but he'll have a rude awakening when he tries to prove it in court." What did you mean by that expression?

A. I meant I believed Mr. Gerber would believe the worst about anyone, as his writings will show, without checking the same to see if it is correct.

Mr. Arguello: I object to the question and the answer. The letter speaks for itself, your Honor.

The Court: Yes; it may go out.

Mr. Bloom: Have you any objection to this catalog?

Mr. Arguello: No.

Q. (By Mr. Bloom): I show you a catalog of W. T. Pollitz, Boston, Massachusetts, in reference to sales at auction conducted September 26, 1947, and the 27th of that month and year, and I will ask you if that is the catalog you used to purchase the

(Testimony of Jack E. Molesworth.)

No. 478 stamp that was subsequently sold to Mr. Gerber. [90]

Mr. Arguello: I object to that question. I don't see where it is material. There is no way we can get into it by way of cross-examination. It is completely self-serving. This party could have secured this catalog any time.

Mr. Bloom: You are charging without any basis he goes and sells fictitious stamps and counterfeits. I am going to show where he got the stamp. One of the biggest dealers in the country listed it as a certain stamp for which he later sold it.

The Court: What is the question?

Mr. Bloom: The question is whether he used that catalog in the purchase of the stamp in question.

The Court: Overrule the objection.

A. Yes, I used this catalog.

Q. (By Mr. Bloom): Will you show us where the particular stamp in question is advertised for sale? A. Lot 188, \$1 fine o.g., catalog \$50.

Q. You bid at that auction for this stamp?

A. I bought that stamp at that auction.

Q. And you bid how much for it?

A. As I recall, \$31.

Q. That was the proper price, was it not, for that stamp as a 478 stamp?

A. Yes, that would have been.

Mr. Bloom: If there is no objection I would

(Testimony of Jack E. Molesworth.)

like to [91] introduce this catalog in evidence as plaintiff's next exhibit.

(The catalog was marked Plaintiff's Exhibit 12 in evidence.)

Q. (By Mr. Bloom): I think you testified that the only difference between the 478 and the 460 was a matter of a watermark? A. That is correct.

Q. Do you have the stamp in question with you?

A. I have a No. 460 and No. 478 which I purchased yesterday from a San Francisco dealer.

Q. You have the 478 in question with you, or don't you?

A. No, I don't have. That stamp was returned to the auctioneer and refund was made.

Q. Would it be easy or difficult to determine whether that stamp is watermarked?

A. It would depend on where the stamp was in the set. The catalog will show this particular stamp was very difficult to determine the watermark, and in fact, I myself never did see a watermark on it.

Q. Tell his Honor why it was difficult.

A. Sometimes, your Honor, a complete watermark will show on a stamp. In other places in the set only a portion of the watermark will show on the stamp. One copy on a certain stamp may have a very obvious watermark, and another copy may have [92] one very difficult to detect. In this case the stamp had been placed in an album with a hinge on it, and it left a mark there which increased the difficulty of seeing the watermark, especially if the

(Testimony of Jack E. Molesworth.)

stamp is under the hinge, which was the case in this instance.

Q. Here is a letter dated August 24, 1949, from W. T. Pollitz, from whom you bought that stamp. Is that letter you received on or about that date?

A. Yes.

Mr. Bloom: I offer it in evidence as plaintiff's next exhibit.

Mr. Giometti: We object to the introduction of that letter. I don't see what purpose it would serve. It is immaterial. He is trying to show that he purchased the stamp that was sold for something correct, and the whole basis of this case is whether or not he did sell a stamp that did not represent what it should to Mr. Gerber.

The Court: Well, those facts have already been developed. He did do that. You have already had the witness testify to this. Does this letter add anything?

Mr. Bloom: Yes, it does, because W. T. Pollitz, one of the biggest dealers in Boston, it shows he made the statement upon which he made his mistake and the reason.

The Court: All right, I will let it in.

(The letter was marked Plaintiff's Exhibit 13 in evidence.) [93]

Q. (By Mr. Bloom): In that second article of Mr. Gerber's, this talk about the counterfeit stamp, to whom was the counterfeit stamp ultimately sold by Mr. Borenstein?

(Testimony of Jack E. Molesworth.)

A. To Mr. John A. Fox, a dealer in New York City.

Mr. Giometti: I object again. I don't see what difference it makes to whom the counterfeit stamp was sold. What difference does that make in this case? The action of the defendant is upon the fact that he did something. His motive is immaterial.

Mr. Bloom: As I understand it, his principal defense appears to be truth. I am going to show that that defense is groundless. He has cross-examined him——

The Court: Of course, you are again anticipating, somewhat.

Mr. Bloom: As I understand it, your Honor, he has cross-examined this witness about a certain Confederate stamp.

The Court: Yes. Well, I think the cross-examination has in truth opened up that field somewhat. Have you got a lot more letters you are going to introduce in evidence?

Mr. Bloom: Not to take up too much time, I will confine my offer now to a letter from the dealer in question, Mr Fox.

Q. Explain that transaction. I show you two letters from John A. Fox of New York City, one dated March 2, 1949, in reference to this Confederate stamp which has been talked about. Did you receive that letter from Mr. Fox? [94]

A. Yes, I received this letter.

(Testimony of Jack E. Molesworth.)

Mr. Bloom: I offer this as plaintiff's next in order.

Mr. Arguello: I will object to that letter. The letter states that he, the buyer, John Fox, discovered it was a counterfeit and that he returned it to him.

Mr. Bloom: And apologized for its late return. He explains why there is a late return. He had no inkling it was wrong when he bought it from Larry Borenstein and that is the reason for the delay.

Mr. Arguello: I don't see any reason for the delay.

Mr. Bloom: You have brought up the question that he didn't return the money for a long period of time. You opened it up.

The Court: Let me see the letter. Well, I will overrule the objection.

(The letter was marked Plaintiff's Exhibit 14 in evidence.)

Q. (By Mr. Bloom): Here is a letter from the same Mr. Fox, purportedly dated August 26, 1949. Did Mr. Fox give that letter to you on or about the date it bears? A. Yes, Mr. Fox did.

Mr. Arguello: I object to this letter. It is an avowal of good character on the part of Mr. Molesworth, a statement by Mr. Fox to that extent.

The Court: I think it has some bearing on the matters that this witness is questioned on. [95]

Mr. Arguello: It is solicited in answer to a letter from Mr. Molesworth upon which we have no oppor-

(Testimony of Jack E. Molesworth.)

tunity to cross-examine, no opportunity to go into, and offered gratuitously at this time.

Mr. Bloom: He attempted to impugn the integrity as a justification for the article by bringing in the Fox purchase. Here is a letter from Mr. Fox saying—

The Court: Let me see the letter first.

Mr. Bloom: Yes, your Honor.

The Court: Just a moment. I can't understand what you are talking about until I see the letter. Well, I think the objection to this letter is good. This is a hearsay statement of opinion by a third person who is not present.

Mr. Bloom: Yes. I didn't understand him to object on that ground.

The Court: Well, maybe he didn't. Sustain the objection. You may have it marked for identification.

Mr. Bloom: Thank you, your Honor.

(The letter was marked Plaintiff's Exhibit 15 for identification.)

Mr. Bloom: That is all.

Mr. Giometti: Your Honor, I have a question I would like to ask.

Recross-Examination

By Mr. Giometti:

Q. Will you look at these stamps and tell [96] me what they are.

A. How do you mean, what they are? What catalog number?

(Testimony of Jack E. Molesworth.)

Q. Yes.

A. That would be either 460 or 478, depending on the watermark. Both perforate 10.

Q. Can you tell from looking at those which is which?

A. No, they would have to be watermarked.

Q. Would you show the stamp to the Court.

Mr. Giometti: Your Honor, one of those stamps is a 460 and the other is a 478. Now, the purpose of showing this is to show that these stamps are so similar that a party must test them to ascertain which is which.

The Court: That is what he just said.

Mr. Giometti: That is what I wish to show and I wish to show how you can test them and how very simple it is to show the difference between the two stamps.

Mr. Bloom: Do I understand he is proposing to examine the stamps?

The Court: I am not going to take time to hear that. I don't see any point to that.

Mr. Giometti: It is simply to show that the stamps can be taken and tested—

The Court: That may be true. Maybe this man is not too competent as a stamp dealer, I don't know, but that is not the question we have before us. [97]

Mr. Bloom: More important, there may be 10,000 different kinds of watermarks or conditions of stamps.

(Testimony of Jack E. Molesworth.)

The Court: I am not going into the matter as to whether that is a good dealer, but much of an expert he is in the field.

Mr. Giometti: The question, if I may urge it, your Honor, is that he has sold these stamps.

The Court: It may be he made many common mistakes. That is beside the question. The question is whether or not there is any justification for these articles in the press. Every time these columnists don't like somebody isn't any excuse for their breaking forth with this sort of literature. I can't try out whether or not this man, this plaintiff, is competent in the mind of someone else with respect to his identification of stamps.

Mr. Giometti: Very well, your Honor.

The Court: I can't see any purpose in going into it. I am not attempting to cut off your examination, but I don't see any point in an examination of the stamps before me in this case. What we have said is sufficient to make a record, so if I am in error you have it in the record.

Mr. Giometti: That is all. [98]

* * *

STEPHEN WARD GERBER

called for the plaintiff under Section 43(b); sworn.

* * *

Direct Examination

By Mr. Abrams:

Q. Where do you live, Mr. Gerber?

A. I am at present living in Montrose, California. [99]

Q. For some years you lived in San Francisco?

A. That is correct.

Q. You testified for almost a day on Tuesday of this week?

A. The deposition you took, yes.

Q. You stated, among other things, did you not, on Tuesday that you have been considered an authority in United States stamps?

A. I don't recall that, unless it was read to me.

Q. You don't recall what you said on Tuesday?

A. To a great extent. I don't recall I said was an authority on United States stamps.

Q. Well, I will call your attention to this question and answer at page 13 of this deposition:

“Well, you are considered in the business or in the trade as an expert stamp collector, are you not, as an expert on stamps?”

“Answer: I probably am, yes.

“Question: Your opinions are respected in the trade, are they not?”

“Answer: I believe they are.”

Does that refresh your memory?

(Testimony of Stephen Ward Gerber.)

A. That answers itself. It is different from your question. Your question wasn't that. Difference between "opinion" and "probably" I am an expert. I am not expressing an opinion.

Q. You never expressed an opinion you are an expert? [100] A. No, sir.

Q. You stand by what you testified to on Tuesday, don't you? A. Surely.

Q. And you testified you got fan mail from all over the country, didn't you? A. Yes.

Q. And that the Weekly Philatelic Gossip was printed, edited and published in Kansas with a circulation of about 15,000 copies, weekly?

A. Two weeks. One of them is correct and the other incorrect.

Q. I am trying to hurry along. Please answer, if you can.

A. I cannot. The answer to that would be "No."

Q. All right, page 14 of that transcript. Was this question asked you:

"Now, in connection with the Weekly Philatelic Gossip, can you tell us where it is published?"
Your answer:

"At Holden, Kansas.

"Question: It is printed, is it, in Holden, Kansas?"

"Answer: Printed and edited and circulated from Holden, Kansas."

Mr. Arguello: We will stipulate to the fact that

(Testimony of Stephen Ward Gerber.)

it is printed, edited and circulated at Holden, Kansas.

Mr. Abrams: He has denied he made the statement. [101]

Q. This question: "Do you know what their circulation is?"

"Answer: No, only by rumor. They never publish circulation figures. I understand from information that is available that it is about 15,000." Did you so testify?

A. I did so testify. I testified I didn't know the circulation.

Q. Did you also testify that from your experience with the magazine it was presumably circulated throughout the United States?

A. I also testified that I supposed, just my opinion, and I have no opinion of their business, and I so testified.

Q. Please—— [102]

* * *

Q. You so testified that you have received letters from every part of the country, haven't you?

A. I did.

Q. And that with regard to the publication of these matters that are at issue, you testified, did you not, that you were completely indifferent as to what you published about Mr. Molesworth?

A. That is a wrong phraseology. That is your phraseology, not mine.

Q. You deny you so testified under oath on Tuesday? A. I deny that. [103]

(Testimony of Stephen Ward Gerber.)

* * *

Q. (By Mr. Abrams): Well, Mr. Gerber, were you completely indifferent to what you published about Mr. Molesworth at the time you published it?

A. Certainly not.

Q. Did you on Tuesday of this week testify as follows, and I have page 137 of the record—

Mr. Arguello: May the witness refer to the record?

Mr. Abrams: Do you have a copy of this?

Mr. Arguello: I couldn't afford a copy.

Mr. Abrams: Is that a statement for the record, you couldn't afford a copy?

Mr. Arguello: Yes, it is a statement for the record.

Mr. Abrams: All right.

Q. I hand you the deposition, page 137, and show you the following, Mr. Abrams' question:

“Were you completely indifferent to what you published about Mr. Molesworth?”

And what is your answer?

The Court: You read it.

A. It says here, “Yes,” but the answer is No.

Q. (By Mr. Abrams): Are you telling the Court that the official stenographer that took this put a “Yes” down when the answer was “No”?

A. The answer is very obvious. You're using the same tactics you did before.

The Court: I can't hear everybody at one time. Sit down and be patient and we will go on. Let's

(Testimony of Stephen Ward Gerber.)

proceed in an orderly way. Suppose you step around, Mr. Abrams, to the front. Read the question and answer and ask if he made the answer. He has a right to make his answer.

Q. (By Mr. Abrams): Do you remember the question and answer, Mr. Gerber?

A. I remember your question. The answer is No. I could explain how that could have occurred. I might not have understood your question. You continually riled me, trying to work up a heart attack.

Mr. Abrams: May that be stricken, your Honor, as not responsive?

The Court: Yes. Will you give me the record? If I can't get the lawyer to ask the question, I will do so myself. The question as asked you, Mr. Witness, is this, page 137 of the deposition, and I want to know whether you gave the following answer to that: "Were you completely indifferent to what you published about Mr. Molesworth? Answer: Yes." Did you make that answer?

The Witness: To my recollection, that is not so.

The Court: You are sure you did not answer that?

The Witness: I didn't answer "Yes" to that.

* * *

Q. (By Mr. Abrams): Did you also testify—I am sorry. Is it a fact, Mr. Gerber, that what effect your articles would have on Mr. Molesworth's future was of no consequence to you in writing the article in question?

(Testimony of Stephen Ward Gerber.)

A. There would be no way I could know what effect it would have on his future. [107]

* * *

Q. (By Mr. Abrams): Did you care what effect your writing these articles would have on Mr. Molesworth?

Mr. Arguello: I suggest this is the same type of question he asked, asking for the opinion of one of the parties.

The Court: I don't know what his answer would be.

Mr. Abrams: His opinion is one of the prime elements in the case, namely, whether he acted with malice.

The Court: Read the question to the witness, please.

(Question read.)

The Court: Overrule the objection. The witness may answer.

Q. (By Mr. Abrams): Did you care, Mr. Gerber?

A. Yes. Well, I couldn't answer that yes or no. You see, I wrote those articles without—

Mr. Abrams: May I interrupt the answer? Anything further, I submit, would not be responsive to the question.

The Court: Not necessarily. When you ask a question that calls for the state of mind of a witness you can't necessarily shut him off.

Mr. Arguello: Complete your answer. [108]

(Testimony of Stephen Ward Gerber.)

A. Yes. In writing those articles I was struck by certain interests that I consider highly motivated, and my only object—I had no other object in the world, never did and still don't have and I couldn't have any other object than to work on behalf of a cause in which I believe. Very often I couldn't—to make that clear—I want to be brief, I know how it is and I want to go ahead. If I knew of a crime committed on the street and I grabbed the criminal, I wouldn't consider what effect it would have on him. The subject of those articles was 100 per cent objective to me. I dealt with a situation of a man doing something wrong. I published the facts to the best of my knowledge and belief, in honesty and sincerity and guided by no malice.

The Court: Thinking you had the facts when you wrote that article?

The Witness: Yes, your Honor.

The Court: Why did you write those articles in the way you wrote them?

The Witness: Well——

The Court: Don't you think that the language of those articles is sardonic and intemperate, to put it mildly?

The Witness: Probably you could draw that conclusion, but it is honest and it is true. The choice of words may not agree——

The Court: I suppose the question opened this up. [109]

(Testimony of Stephen Ward Gerber.)

Q. Before writing the article did you write Mr. Molesworth and ask for his side of the story you had received?

A. It wasn't necessary, in my opinion.

The Court: No, no. Did you?

The Witness: No.

Q. (By Mr. Abrams): Did you give Mr. Molesworth a chance to defend himself or to produce evidence before you accepted the statements that you had from other people about him? [110]

A. Yes.

Q. Now, I call your attention to page 68 in the record.

“Question: Did you”——

Mr. Arguello: Let the witness read the page.

The Court: All Mr. Abrams is doing is saving time by showing it to him and reading it at the same time.

Q. (By Mr. Abrams): “Did you give Mr. Molesworth a chance to defend himself and to produce evidence before you accepted a statement from other people? Answer: I don't recall doing so.”

The Court: The question is, Did you give that answer?

A. I probably did. I didn't recall doing so. I thought I did answer “Yes,” because I remember one instance where it seemed to me I did so. It isn't a very emphatic “Yes.”

Q. (By Mr. Abrams): You realized at the time you wrote the article, Mr. Gerber, that when you

(Testimony of Stephen Ward Gerber.)

said, "The Mole's worth will have to be tested in a different racket," you were referring to Mr. Molesworth's operation as a racket, weren't you?

Mr. Arguello: Objection. I think the article speaks for itself. There is no point in going into each and every line of the article; it is in evidence.

The Court: Overrule the objection.

Q. (By Mr. Abrams): Isn't that right?

A. I gave a five-page explanation of what I consider a racket. [111]

Q. Will you please answer the question so we can get along. Have you lost the question?

The Court: Read it to him.

(Question read.)

A. I will have to answer with an explanation of what I consider a racket. When I express myself and use a word I am entitled to make a definition. [112]

* * *

Q. (By Mr. Abrams): When you accused Mr. Molesworth of substituting a No. 460 for a 478 stamp in that article, you, after forty years' experience in the business, called it a 50-cent stamp, didn't you?

Mr. Arguello: Objection. I can't see what bearing that has on the issue as to whether or not Mr. Molesworth sold a [113] 460 or 478.

The Court: Mr. Abrams, I don't know what the practice is in the district from which you come, but this line of examination is highly argumentative. You have the article in evidence and it is of no

(Testimony of Stephen Ward Gerber.)

consequence to the court what the views of the witness are. You don't have to go into any examination on this subject at all, because, in my opinion, the article in question is on its face highly scandalous and libelous and never should have been permitted to have been published in any magazine of any kind. It isn't going to do any good for us to take this up line by line, and ask the witness what his opinion is of what he wrote in the magazine. That is my job, to look at it and read it and decide it without the opinion of this witness.

Mr. Abrams: How is your Honor going to figure damages? Let's assume everything that happened is in and you have to sit down and find out how much——

The Court: I don't see anything you are asking has anything to do with that.

Mr. Abrams: If this man showed wanton, reckless, wilful disregard of the rights of Mr. Molesworth so that pecuniary damages should be awarded by this Court, this examination is material as showing the reckless, wanton, wilful disregard of Mr. Molesworth's rights.

The Court: You don't have to argue that because on the [114] face of the article, in the absence of any showing by the defendant as yet, I would be prepared to hold that that article constituted exemplary damages.

Mr. Abrams: All right.

The Court: That is, of course, on the face of the matter as it appears before the Court in the article.

(Testimony of Stephen Ward Gerber.)

Mr. Abrams: All right, I will stop, your Honor, right here.

The Court: It may be that the defense can present evidence that would show that the plaintiff in this case is the type of person against whom such language would be fully justified. That would be a matter of defense. [115]

* * *

Mr. Bloom: The sale price is stated in that advertisement.

The Court: Ask him the question.

Mr. Abrams: I was trying to avoid too much interrogation by simply putting in an exhibit that was already marked without objection the other day.

The Court: Do you object to it?

Mr. Giometti: I don't see the purpose.

The Court: What is it?

Mr. Abrams: It says, "\$23,500. At this price this property is a 'steal'."

The Court: Is that the price you put on the property in the advertisement?

A. Yes. That is not what I sold it for, that is the advertised price. [119]

* * *

The Court: I am inclined to believe those advertisements [121] are not competent in this case for any purpose that I can see. You may have them marked for identification.

Mr. Abrams: I may that, Your Honor. We will save our rights to the exclusion.

(Testimony of Stephen Ward Gerber.)

(Documents were thereupon marked Plaintiff's Exhibits Nos. 16 and 17 for identification.)

Q. (By Mr. Abrams): Now, Mr. Gerber, you sent this letter as part of the Borenstein correspondence, part of which has been introduced by your attorney, did you not, under date——

Mr. Arguello: Can I see the letter, counsel?

Mr. Abrams: I wish you wouldn't interrupt until we get through asking this, at least.

Mr. Arguello: It is the practice in this jurisdiction to show the letter to the attorney for the opposition before presenting it to the witness.

Mr. Bloom: We have shown that to you. We will be happy to show it again.

Mr. Arguello: I have no way of knowing what it is you are referring to.

Mr. Abrams: No use showing it to the attorney unless it is identified as having been sent by him.

Q. Was this sent by you, this piece of paper here?

A. That is a very small part of a letter that I sent.

Q. I didn't ask you that, did I, sir?

A. You asked me whether this was a letter. I said it was part. [122]

Q. I said, was this paper—I used the word paper—was this a paper you sent to Mr. Borenstein?

A. Not alone, no; not by itself.

Q. Well, you sent that paper, did you not?

A. With additional. This is part of a letter I sent Mr. Borenstein. Not a letter.

(Testimony of Stephen Ward Gerber.)

The Court: All right. That answers the question.

Q. Mr. Borenstein only sent us what pertained to Molesworth.

Mr. Arguello: I ask that that go out.

The Court: The witness just said it was part of a letter.

Mr. Abrams: He is talking about another matter. Read it and you will see. Read it, although you have read it before, I understand. I am now offering this, Your Honor, at least that portion that applies to the plaintiff Molesworth's case.

Mr. Arguello: Outside of the fact that the record showed this was only a portion of the record—

Mr. Abrams: Yes, and the last paragraph is about another person entirely.

(The document referred to was marked Plaintiff's Exhibit No. 18 and received in evidence.)

Mr. Abrams: This letter, Your Honor, is dated February 20, 1949, and reads—if Your Honor recalls, the letter was introduced, subsequent to this, by Mr. Molesworth to Mr. Borenstein, and this is from the defendant to Mr. Borenstein.

(Reading Plaintiff's Exhibit 18.) [123]

That is where that sheet ends.

Q. Now, Mr. Gerber, at the time you wrote this letter about wearing a uniform illegally in violation of regulations, you knew a man in the navy on ter-

(Testimony of Stephen Ward Gerber.)

minal leave had a right to wear a uniform, didn't you?

Mr. Arguello: I object to that.

A. I do not. I know no such thing. I will answer him.

* * *

Q. (By Mr. Abrams): After writing this to Larry Borenstein—he was an associate editor of yours on the *Weekly Philatelic Gossip*, wasn't he?

A. If you will tell me what you are trying to infer by "associate editor," I will be glad to answer. An associate editor does not get paid. Everybody that ever wrote for *Gossip* is an associate editor. He is a staff dealer. I never met the man in my life.

Q. What is his position? [124]

A. No position. He is a staff dealer. About two or three times a year he would write a small article.

Q. He was a contributor?

A. Yes, but no pay.

The Court: He was a contributor who did not get paid for his articles?

A. Correct.

Q. (By Mr. Abrams): His name appears in the publication, though, as an associate, doesn't it?

A. With about twenty others.

The Court: That answers the question. He is an associate editor, whatever that means.

Mr. Abrams: Yes.

(Testimony of Stephen Ward Gerber.)

Q. However, you wrote Mr. Borenstein you were going to “take another swipe at him” and “he will get his brains beaten out?” You wrote that, that you were going to take another swipe at him, didn’t you? A. Yes.

Q. And you knew that “this kid” you refer to in this letter as “this kid,” you knew that he was only 22 years old at the time you were going to beat his brains out?

A. I wrote that after—just prior to my writing that letter—that letter consisted of three pages. There is another full page on Molesworth, and I will stand on what I said there.

Q. Will you produce the other, if you have the other page now, [125] please?

A. The three pages went to New Orleans to Mr. Borenstein. I can’t produce what was sent to him.

Q. Have you got a copy of it?

A. No, I haven’t.

* * *

FRANK SANKEY

called on behalf of the defendant; sworn.

* * *

Direct Examination

By Mr. Arguello:

Q. What is your occupation, Mr. Sankey? [126]

A. I am a stamp dealer, postage stamps, and stamp collector.

* * *

(Testimony of Frank Sankey.)

Q. Are you familiar, Mr. Sankey, with the method of selling stamps by dealers and by auctioneers in the stamp world? A. I think so.

Q. Can you tell us how a stamp auction is conducted, Mr. Sankey?

A. Well, that is out of our line of business. I don't know if I can give you an adequate description. People merely bid on stamps. They are offered in lots and the values are put down, the approximate values, catalogue values. People bid on them whatever they think the stamp is worth. The stamp is described in the auction catalogue.

* * *

Q. (By Mr. Arguello): Mr. Sankey, in the operation of the stamp business are there any surveys or tests—withdraw that. In the operation of the stamp business, the United States Stamp Company, are you aware of any change in the volume of business in the stamp business in the last two years?

A. Rather acutely so, yes.

Mr. Abrams: Plaintiff objects to the question.

The Court: Why don't you lay a little more foundation as to the extent of his business, nature, and so forth? [136]

Mr. Arguello: Very well.

Q. In the sale of stamps by the United States Stamp Company, Mr. Sankey, do you sell stamps on a nationwide basis? A. That is right.

Q. Do you sell stamps in the Eastern part of the United States? A. Yes, we do.

(Testimony of Frank Sankey.)

Q. And in the United States possessions?

A. Yes.

Q. As a matter of fact, worldwide?

A. All over the world, yes.

Q. In the operation of that worldwide stamp business have you noticed a change in the volume of your business in the last two years?

Mr. Bloom: If your Honor please, I will object. I believe that the question is incompetent, and irrelevant, namely, what has happened to this gentleman's business.

The Court: Of course, that may go more to the weight of his testimony, and also may be only preliminary.

Mr. Bloom: Perhaps it is just preliminary, I don't know, but his particular experience would have no particular bearing on the general history of the trade.

The Court: Are there any trade journals that set forth the volume of business to ascertain whether or not the volume goes up or down?

The Witness: It is probably commented on, but there are [137] no authentic statistics.

The Court: There is no trade publication that publishes statistics on it?

The Witness: No.

The Court: So whatever statement you might make of the condition of the business would be based on your experience and discussions with other dealers?

(Testimony of Frank Sankey.)

The Witness: Yes, but I think it would be fairly accurate, a fairly accurate idea of values as of today.

The Court: How large a business have you, I mean as compared with others?

The Witness: I suspect we have the largest business on the West Coast by far. I am one of the largest businesses outside of New York or Boston.

The Court: Where is your business?

The Witness: On Brush Street.

The Court: Is that near the Russ Building?

The Witness: Yes, right near.

The Court: Overrule the objection. You may answer.

Q. (By Mr. Arguello): You have noticed a change in the volume of sales in the stamp business?

A. Yes, sir.

Q. What is that change, Mr. Sankey?

A. Well, there has been a gradual decline, more markedly this last six months, but it has been gradual for the last two years. [138]

Q. In comparison to, and taking 1948 as 100 per cent, what percentage do you think 1949, based on the first seven months of 1949, what percentage it would have dropped off.

Mr. Bloom: May it be understood the plaintiff's objection runs to this entire line of questioning, your Honor?

The Court: Yes.

Mr. Bloom: I haven't quite got it clear yet whether the witness is talking about one branch of

(Testimony of Frank Sankey.)

this business, the dealers' end, or if he is also talking about auctioneering and other phases.

The Court: I assume you are referring to the volume of business transacted by you and other similar dealers engaged in the business of selling stamps generally?

The Witness: Yes, that is right.

Q. (By Mr. Arguello): Can you answer the question? What is the percentage?

The Court: What is the percentage of drop this years as against 1948, isn't that the question?

Mr. Arguello: That is right, your Honor.

A. I would say 10 to 20 per cent. It varies from different groups and countries.

Q. 10 to 20 per cent? In the United States particularly?

A. Less in United States stamps than in the foreign stamps, but the drop-off has been marked throughout.

Q. Now, Mr. Sankey, how many large stamp auction houses are [139] there in the United States actively engaged in the business of selling stamps?

A. I don't know the number. There are many. There are hundreds of them. New York is alive with auction houses.

Q. Do you have any idea how many stamp auctions were conducted last year?

A. I haven't, no.

Q. Could you make any estimate?

A. I wouldn't want to hazard a guess. I would rather not.

(Testimony of Frank Sankey.)

Q. Are you familiar with the Ohlman Galleries in New York? A. I know of them, yes.

Q. Are they a large stamp house?

A. They are considered fairly large.

Mr. Arguello: I think that is all. Just a moment.

Mr. Giometti: I have a question or two, your Honor, if you will permit.

Q. Mr. Sankey, are you familiar with the values of stamps, in other words, do you know the prices?

A. I think so.

Q. At the present time has been a change in the market price of stamps today as contrasted with 1948? A. Why, yes.

Q. What is that change, Mr. Sankey?

A. A drop in prices this year over last year.

Q. Can you tell us percentagewise approximately what that [140] drop is?

A. I mentioned I thought from 10 to 20 per cent.

Q. That is, the drop in price of stamps is from 10 to 20 per cent? A. Yes, in value.

Mr. Giometti: Thank you.

Cross-Examination

By Mr. Abrams:

Q. Did I understand your name is Sankey or Stankey? A. Sankey.

Q. Would you say, Mr. Sankey, that integrity is an important thing in the business of selling stamps?

(Testimony of Frank Sankey.)

A. I personally think it is an essential thing.

Q. Without confidence in the dealer, it is really impossible for the dealer to remain in business?

A. I would think so, yes. [141]

* * *

Q. The conditions of stamps are a prime factor in determining price? A. Yes.

Q. All right. So that in any event, with the difference in value so slight, \$15 in the mint with the 478 more valuable than the 460, and with that a slight difference, \$5.60, it would be silly for a dealer—and with a sale being made, a percentage of that catalog difference only, it would be silly, wouldn't it, from your knowledge of the stamp business as a dealer, for a dealer to try to palm it off on another?

A. I would think it would be. [143]

* * *

Q. (By Mr. Abrams): I see. You would say, then, that [144] whether a stamp is one thing or another is something that can be the subject matter of mistake? A. Well, certainly.

Q. Therefore, because in the common dealing in stamps mistakes can be made, you test every single stamp before you pay for it, don't you?

A. That is correct.

Q. And you have found in operating the business that that is something that just has to be done in order to make sure in dealing in stamps that no mistakes are made? A. That is right.

* * *

(Testimony of Frank Sankey.)

The Court: Mr. Sankey, let me ask you about this matter of verifying the authenticity and correctness or incorrectness of stamps. It is a technical matter from which you acquire knowledge as a result, I suppose, of many years of experience?

The Witness: I think so.

The Court: Is it true that there are differences of opinion arrived at as to what stamps are, what issue they are? [147]

The Witness: Well, there can be.

The Court: Do you find in your business and dealing with others that there are cases where there are mistakes made in identification?

The Witness: That can be, yes.

The Court: That does happen?

The Witness: Yes, it does.

The Court: Do the dealers as between themselves and their customers make adjustments?

The Witness: We always do if there is any error.

The Court: You find errors, do you, at times as they do in all businesses?

The Witness: That is right.

The Court: That is all.

Mr. Giometti: I have a question I would like to ask along the same line your Honor was asking about.

Q. You say there are mistakes made in stamps because it is technical. What about a situation where you have one stamp that is watermarked and one stamp that is not watermarked, such as we

(Testimony of Frank Sankey.)

have in the situation here where we have stamp No. 460 and stamp No. 478? What is the possibility of making a mistake when you are dealing with those two stamps?

A. Well, it could happen, but when you see the watermark here you assume it is a cheaper stamp, No. 460—478. If you can't see the watermark you assume it is the other. [148]

* * *

ALBERT HENRY

called for the defendant; sworn. [149]

The Court: State your name.

The Witness: Albert Henry.

Direct Examination

By Mr. Arguello:

Q. What is your occupation?

A. I am a dealer in postage stamps and collector.

Q. Where is your stamp business located?

A. In the Palace Hotel, San Francisco. [150]

* * *

Q. Did you ever have any dealings with Mr. Molesworth in the stamp business?

A. I had one deal.

Q. When was that?

A. Approximately two years ago, I think; around one and a half years, two years ago.

Q. What was the nature of that transaction?

(Testimony of Albert Henry.)

A. If I remember correctly, Mr. Molesworth bid at one of my auctions and he was fortunate enough to obtain two or three hundred dollars worth of merchandise.

Mr. Abrams: He was what, did you say? Fortunate?

The Witness: That is right. And he accepted the merchandise and he didn't like it after he got it and sent it back, the majority of it. I don't recall the exact figure. [155]

Q. (By Mr. Arguello): Just digressing a moment, I think when plaintiff bids in your auction, he bids by letter?

A. Yes, we have written bids sent in. We have a written bid sheet.

Q. Following that return of stamps did you take any action with regard to Mr. Molesworth's name on your lists?

A. That ended our auction business, so therefore we didn't have any opportunity to do that.

Q. Did you consider the return made by Mr. Molesworth in that specific instance unreasonable?

Mr. Bloom: I think that calls for an opinion and conclusion.

The Court: Sustained. I am not going to accept evidence as to the opinion of some person who had a transaction with the plaintiff here.

Mr. Arguello: It is a specific reference to an unreasonable return, your Honor.

The Court: My gracious! That is one of the things, in my opinion, that is a sad commentary

(Testimony of Albert Henry.)

on our American society today. Everybody condemns everybody else because they had some experience with them. I should think businessmen would be a little more cautious in that sort of thing. I don't think this gentleman, if he is engaged in business in San Francisco, is going to make a statement in a court of law concerning a man with whom he had one transaction and give his [156] opinion as to the business character of the man he is doing business with. He might find himself in the same boat.

Mr. Arguello: We are not asking him to testify about character.

The Court: Am I right in that, Mr. Henry?

The Witness: I have nothing to say about that anyway, Judge, his character. I know nothing about it.

Mr. Arguello: One of the statements alleged to be false is that the plaintiff made unreasonable returns.

The Court: How did this defendant columnist in this case find out about the transactions with you?

The Witness: He asked me about it. In fact, I told him about it. He asked me if I had ever had any dealings with Mr. Molesworth and I told him I just had one and that was all. That was how he found out about it.

Mr. Bloom: When did he ask you that?

The Witness: Gosh, that's six or eight months ago.

(Testimony of Albert Henry.)

The Court: Well, go ahead, counsel. [157]

* * *

Q. (By Mr. Giometti): Do you remember how long Mr. Molesworth kept the stamps [158] before he made the return?

A. That is the only thing I do remember. I think his returns irregular.

The Court: No, no. You should be cautious. You are a businessman. Don't make statements about other people and draw your own conclusions. You were just asked the question how long it was.

The Witness: Thirty days.

Q. (By Mr. Giometti): When you have an auction, what is the usual period of time in which people return, or may expect returns on their bids when they make a bid at a stamp auction?

Mr. Bloom: I object to that, being incompetent, irrelevant and immaterial as to what his customer may do.

Mr. Giometti: I don't think so.

The Court: I would think so. Had a man bought stamps from me in San Francisco, there would be a different time element than in Boston or Timbuctoo.

Q. (By Mr. Giometti): When you sent them back to Mr. Molesworth, how did you send them?

A. At that time I think we sent our stamps—I think I sent it airmail.

Q. Registered mail, special delivery, or just straight mail?

A. Quantities like that we would have sent regis-

(Testimony of Albert Henry.)

tered. I am guessing, but I think we would have sent it registered. [159]

* * *

Cross-Examination

By Mr. Abrams:

Q. You told the Court he didn't make the return for thirty days, didn't you?

A. That is right.

Q. I show you a check and I show you your invoice it covers. Is that yours?

A. Yes, sir, it is.

Q. Dated October 20, 1947, isn't it?

A. Yes.

Q. Signed with your signature. What is the date of this check that was sent to you from Boston?

Mr. Giometti: I can't see how the date of that check would be material. What bearing would it have, whether it was paid or not?

The Witness: I didn't say it wasn't paid. I said he didn't return it.

Q. (By Mr. Abrams): Oh, I see; you are distinguishing between them.

Mr. Arguello: May we have a ruling on the objection?

The Court: Overrule the objection.

Q. (By Mr. Abrams): The date of this check is November 3, 1947? A. That is right.

Q. The date of your invoice is October 20, 1947, right? A. That is right.

(Testimony of Albert Henry.)

Q. How many days would you say it took for this invoice to get to Boston?

A. Airmail, I don't know; two or three days, I suppose.

Q. Assuming it got to him October 23—I don't know whether that was a Sunday or not, but in any event, October 23, ten days later or less, he mailed you a check for the stamps?

Mr. Arguello: There is no showing on that. The date of the check wouldn't show when it was mailed.

Mr. Abrams: Look at the cancellation and you may get some idea when this man deposited it in San Francisco. Does your Honor see the "11/3" that is written on the back of the [163] invoice of what was returned and what was paid for?

Q. (By Mr. Abrams): Take a look at this, Mr. Henry, and tell the Court if you want to change your testimony he didn't make those returns for thirty days to you, but that he made them in ten days' time.

A. May I say that the check undoubtedly was in ten days' time. As I recall, the lots did not come back with the return.

Q. But when you got the check there you knew he was paying for a portion of what had been sold to him?

Mr. Arguello: Is there any showing that this check arrived in ten days, or are you assuming that to be the fact? Let's find out about that before you continue.

(Testimony of Albert Henry.)

The Clerk: 11/17/47 it went through the Boston bank.

Mr. Abrams: It came back to Boston after being deposited in California, because that is how the stamp got on the back of it from the Boston bank that paid.

The Court: Yes, the check got back to Boston November 11.

Mr. Abrams: After having traveled from Boston to California and back again and after it was deposited in the bank.

A. I didn't question Mr. Molesworth's payment of the merchandise.

Q. Were you trying to create the impression, the fact that you didn't get paid for thirty days, when you said he didn't make returns for thirty days? [164]

A. No, sir, return of merchandise, not money. I never questioned his money end of the transaction.

Q. At the time you took the stand you knew you had been paid in ten days, didn't you?

A. No, I did not.

Q. As a matter of fact, you wrote a letter of apology to Mr. Molesworth because the stamps had to be returned, didn't you?

A. I don't recall that.

Q. Haven't you been asked to check up on this transaction? A. No.

Q. Before you took the stand did you take out your records? A. No.

(Testimony of Albert Henry.)

Q. Did you check up to see why he returned the lots? A. Yes, I remember.

Q. Did you check any books or records, any writings or documents? A. No.

Q. Did you look through your file to find a copy of that letter you sent him in connection with it?

A. No, I didn't.

Mr. Abrams: I am offering this check and this invoice.

(The check and invoice were marked Plaintiff's Exhibit 19 in evidence.)

Mr. Abrams: I regret not knowing this witness was going to testify. We haven't got the letter referred to, but I have [165] evidence that such a letter was sent.

Q. Do you have your mail here in San Francisco—I mean, do you have that copy?

A. I have no record of any dealings with Mr. Molesworth at all.

The Court: Didn't you have some record when the merchandise was returned? Wouldn't the inventory show when this happened?

The Witness: The merchandise Mr. Molesworth returned, as I remember, was sold about two days later locally.

The Court: Then you would have a record of that sale?

The Witness: I would have an accumulative day's business, and that is all.

(Testimony of Albert Henry.)

Q. (By Mr. Abrams): That is, you wouldn't have any record it had been returned?

The Court: You said on direct examination that this—you started to tell me and I stopped you, that this transaction was irregular because it took thirty days. Now it appears that this all happened within ten or twelve days. What made you say it was thirty days?

The Witness: Judge, it was just recollection.

The Court: You may be mistaken about this?

The Witness: I could be mistaken as to the date the merchandise came back. Not his check. I didn't question the payment of the merchandise at all.

Q. (By Mr. Abrams): Wouldn't the back of this statement, Mr. Henry, show a check was sent back with the merchandise right away? Will you read that, please.

A. It is an assumption. It may have come back in a different envelope. I don't recall.

Q. Is it common for stamp people to pay postage on two different envelopes when they can use one?

A. I would say it is customary, yes.

Q. To use two different envelopes?

A. Usually mail the check, and the other is bulky.

Q. But one stamp can be \$300. Why did you say it is customary?

Mr. Arguello: I object to this line of questioning.

The Court: That is argumentative. Sustain the objection.

(Testimony of Albert Henry.)

Q. (By Mr. Abrams): You see what is on the back there? Does that refresh your recollection that the lots were returned with the check?

A. I don't recall it being returned with the check. It may have been; I don't recall.

Mr. Abrams: They may have been. That is all.

The Court: Any further questions of this witness?

Mr. Bloom: No.

The Court: That is all. You may be excused. We will take a brief recess at this time.

(Recess.) [167]

STEPHEN WARD GERBER

resumed.

Cross-Examination

(Continued)

By Mr. Arguello:

Q. Mr. Gerber, you are interested in the collection of stamps, are you not? A. Yes, sir.

Q. How long have you collected stamps, Mr. Gerber? A. Over forty years.

Q. As a development of your interest in collecting stamps, at one time you operated a stamp business, did you not, Mr. Gerber? A. Yes, sir.

Q. What was the name of the business?

A. Well, National Stamp Company.

Q. How long did you operate that business?

A. About two years.

Q. As a result of that—withdraw that. Did you

(Testimony of Stephen Ward Gerber.)

at any time devote your whole time to the sale of stamps as a stamp dealer? A. No, sir.

Q. What is your regular occupation?

A. Salesman.

Q. By whom are you employed?

A. I am unemployed.

Q. By whom were you employed? [168]

A. I was last employed by an oil company in Philadelphia, Pennsylvania.

Mr. Abrams: Did you say when that was?

The Witness: I was employed there for sixteen years prior to October, 1947.

Q. (By Mr. Arguello): Mr. Gerber, in your interest in the collection of stamps have you belonged to stamp societies? A. Yes, sir.

Q. What stamp societies are you a member of?

A. I am a member of the American Stamp Dealers Association; American Philatelic Association; Society of Philatelic Americans; Bureau Issues Association; Palo Alto Stamp Club; Redwood City Stamp Club; Veterans Stamp Club; honorary member of the Omaha Stamp Club, and Trans-Mississippi Philatelic Society; honorary member of the Stamp Club, United States Naval Hospital, Mare Island; Veterans Hospital, Staten Island; also Santa Margarita Farm in Oceanside, California; there may be others.

Q. As an interest work, in your stamp collection and dealing, have you written a column dealing with the stamp business? A. Yes, sir.

(Testimony of Stephen Ward Gerber.)

Q. That is the one that appears in the Weekly Philatelic Gossip? A. Yes, sir.

Q. As and for the writing of that column did you receive any consideration?

A. No consideration. No compensation whatsoever of any kind. [169]

* * *

Q. (By Mr. Arguello): What dealers did you talk to about Mr. Molesworth, Mr. Gerber?

A. Larry Borenstein of New Orleans; Herman Hurst, of New York; Max Ohlman of New York; Al Henry of San Francisco; Hy Bedrin of New York.

Q. Did you receive communications from those dealers? A. Yes, sir.

Mr. Abrams: I will have to object to this, your Honor.

The Court: May I see the letters, please.

Mr. Arguello: Will you state the ground of your objection, counsel.

The Court: I don't see why you object to this.

Mr. Abrams: My trouble is, it is hearsay piled on hearsay, your Honor.

The Court: That is not unfavorable to your side of the [172] case. However, use your own judgment.

Mr. Abrams: I would like to be fairly consistent, and I don't know what the next letter might be that might not be so favorable to my case. The man

(Testimony of Stephen Ward Gerber.)

asks in it that he doesn't want this mentioned, and so forth.

The Court: The man says in this letter that his returns have been fairly excessive and in some cases justified, and he says, "Very often I believe he buys stamps thinking he has a certain sale."

Mr. Abrams: I will defer to your Honor's judgment.

The Court: You may use your own judgment, but I think this is favorable to the plaintiff's contention.

Mr. Arguello: One of the items of alleged libel is the fact that he believes that these practices of selling stamps, when you secure them from an auctioneer for the purpose of submitting them to customers before returning them, is not an ethical practice.

The Court: I agree with you. I don't want you to think I am trying to take the case out of your hands, because I know you have been thinking about it in the preparation for the trial of the case with diligence. I can see that. What you say is true, but when you put in evidence a letter that the defendant received and in which the merest, the worst kind of hearsay is indulged in as evidence of the truth of statements which he printed, I think it would be better left [173] alone.

Mr. Arguello: There is only this point, in a libel case any material upon which the writer relied or used in part of his investigation, or any part thereof

(Testimony of Stephen Ward Gerber.)

of that knowledge he gained relative to the plaintiff, is material regardless of the fact that it might be hearsay.

Mr. Abrams: I withdraw my objection, Mr. Arguello. I don't think we need to argue it.

The Court: Perhaps I have said too much already in regard to this letter. You have offered it and the objection has been withdraw and I have read it, and the letter may be received.

(The letter was marked Defendant's Exhibit D in evidence.)

Mr. Arguello: This is the letter (handing to witness).

Mr. Bloom: You are referring to the letter of Mr. Ohlman, Mr. Arguello?

Mr. Arguello: That is correct.

Q. Now, you made inquiry of a Mr. M. Ohlman, is that correct? A. That is correct.

Q. Did you receive a reply from him?

A. Yes, sir.

Q. I will ask you to identify that letter. Is that the reply? A. Yes, sir.

Mr. Arguello: I will offer that in evidence as having a comment on Mr. Molesworth, as the defendant's next in order. [174]

The Clerk: May that be withdrawn from the deposition?

Mr. Abrams: It may, as far as I am concerned.

Mr. Arguello: Is there any objection to it?

(Testimony of Stephen Ward Gerber.)

Mr Abrams: No objection.

(The letter was marked Defendant's Exhibit E in evidence.)

The Court: Perhaps it would save time if I read it. You may take it from the deposition and mark it Exhibit E. [175]

* * *

Q. (By Mr. Arguello): Who else did you discuss this case with before your publication, Mr. Gerber? A. In addition to the letters?

Q. Yes.

A. Among the names I mentioned were Larry Borenstein and Herman Hurst.

Q. When did you have a conversation with Mr. Hurst?

A. I couldn't fix the exact date, but it was before the publication of the article. I couldn't fix the exact month or date.

Q. Approximately what date?

A. It would have to have been between May and October, 1948.

Q. What was the substance of that conversation? [179]

* * *

A. Mr. Hurst had come West on a trip, and he knew I was writing the column, and naturally discussing various phases of it, among which was Molesworth. I told him my experience with him and some of the stories I heard. The substance of the conversation, do you want?

(Testimony of Stephen Ward Gerber.)

Mr. Arguello: Yes.

The Court: What he told you.

Q. (By Mr. Arguello): What he told you.

A. Nothing derogatory except that that was the first time I found out Molesworth was young. He told me he was just a young fellow, a midshipman in the Naval Reserve, getting an education from— This is the story he gave me. I don't know the facts, but getting an education from the Navy and he was dealing in stamps on the side.

Mr. Abrams: The first two words—"nothing derogatory"?

The Witness: That is right, he told me nothing derogatory.

Q. (By Mr. Arguello): Did you discuss this matter with anybody else?

A. Larry Borenstein.

Q. What was the subject matter—I mean, the content—when was that conversation?

A. That was also in the same period of time.

Mr. Bloom: I assume this is admitted under the same rule?

The Court: Are you objecting to it? [180]

Mr. Abrams: No. There is a letter there with Borenstein, anyway.

Q. (By Mr. Arguello): What was the content of that discussion?

A. He told me that he had done business with Molesworth and I told him what the facts were that I had gathered from my own experience and

(Testimony of Stephen Ward Gerber.)

the knowledge of others. He told me he was an impetuous kid and that he had tried to sue a couple of people. In fact, he even wrote me a letter he was trying to get experience in business by suing people.

Q. Who wrote you a letter?

A. Mr.—

Mr. Abrams: Borenstein?

A. Borenstein.

Q. (By Mr. Arguello): Where is that letter?

A. I believe I have that letter.

Mr. Bloom: Have you got it in your possession?

Mr. Arguello: Are you conducting this examination?

Mr. Bloom: No, but he is testifying to a conversation and says he has a letter.

Mr. Arguello: You can ask him for it.

The Court: Let's not get excited.

A. He also told me on the telephone that he had written Molesworth about it, and that his information on Molesworth was such he convinced Molesworth that that was a very, very poor procedure to follow. [181]

* * *

Q. (By Mr. Arguello): Now, in July, 1949, a third article was written. I am calling your attention to that article wherein a letter was quoted. Did you have knowledge at the time that you wrote this column as to the existence and the receipt of Mr. Molesworth's letter in the office of the publisher?

(Testimony of Stephen Ward Gerber.)

A. Oh, no. You mean at the time, did I have knowledge of it [183] before I wrote the article?

Q. Yes.

A. Certainly. I quoted the letter in the article.

* * *

Q. (By Mr. Arguello): Now, any reference in the column you made to the 460 and 478 was based upon your personal knowledge in dealing with the defendant, is that correct? A. Yes, sir.

Q. And the statement you made relative to counterfeit was based upon your knowledge and observation of the letter written by the plaintiff—

A. Yes, sir, and his admission.

Q. —about the sale of the stamps?

A. Yes, sir.

Q. The statement as to his methods in respect to returns— [185] A. Were true.

Q. Don't anticipate me. Were based on your letters and conversations with the dealers?

A. And my personal experience.

Q. What was your personal experience of Mr. Molesworth, with Mr. Molesworth in regard to improper returns?

A. I submitted to him six lots of which—now, the figure may be technically wrong, but for the purpose of—I think they are correct—they are valued about \$227. Out of those he returned over \$200 worth and wrote a note along with it impeaching my integrity.

Mr. Bloom: Haven't we had all this before?

(Testimony of Stephen Ward Gerber.)

The Witness: It was my experience that permitted me to write this column. That is what I wrote about.

The Court: Isn't this a reference to exhibits already in evidence?

Mr. Bloom: And testified to.

The Court: Strike the answer. I don't want any comment of the witness on what is already in evidence.

Mr. Arguello: That is all I have with this witness at this time.

Redirect Examination

By Mr. Abrams:

Q. Mr. Gerber, just briefly, if I may, didn't you find out from Mr. Ohlman at the same time you got that letter that Mr. Molesworth was technically correct in making the [186] returns that he did? A. No.

Q. Before you published your letter?

A. No.

Q. And that never occurred that he notified you he was technically correct in making the returns?

Mr. Arguello: I object to the question. It is a reference to something not in evidence and, further, the deposition of Mr. Ohlman is here and will be introduced by the defendant.

Mr. Abrams: We have got a lot of noes, and you say it is not in evidence. Could I have that letter of Mr. Ohlman, because it is in evidence.

(Testimony of Stephen Ward Gerber.)

The Court: I thought I read it.

Mr. Abrams: Sure, in the letter.

Mr. Arguello: You are referring to another letter.

Mr. Abrams: No, I am referring to the letter his Honor read from Ohlman.

The Court: I read the letter.

Mr. Abrams: Now he denies he got the letter before——

The Witness: I made no denial. I am trusting to my memory and I am telling you to the best of my information and belief. I am not up here to lie on technicalities.

The Court: That is already in evidence. I don't understand the purpose of your reference.

Mr. Abrams: This is August 19, 1948, and the article [187] wasn't published until October 30, 1948.

The Court: You have that in evidence already. The fact you are trying to develop is in the letter.

Mr. Abrams: It wasn't for that purpose. I was trying to attack the credibility of this witness, which I submit has been successfully done. He was very fast to deny Mr. Ohlman told him he was technically right in those returns, and the letter itself said Mr. Molesworth was technically right in those returns.

The Court: Are you talking about something in the deposition?

Mr. Abrams: The question I just asked.

(Testimony of Stephen Ward Gerber.)

The Witness: Consider. Consider. You can't ask me whether I read a part of a certain sentence in there. I haven't read that letter in months. I don't recall any such comment. You are using the same tactics you used in the deposition until you got me into a heart attack. I am willing to answer your questions.

Mr. Arguello: I suggest you show the witness the letter you are referring to.

The Court: Go ahead. You have already covered that point.

Q. (By Mr. Abrams): When Mr. Molesworth asked you for a chance to give his side of the case you didn't give him that chance, did you? [188]

The Court: You have already asked him that question and he already answered that this morning, that he did not.

Mr. Abrams: I am sorry. [189]

* * *

Q. (By Mr. Abrams): Before taking the witness stand here today, or before having your deposition taken on Tuesday, have you inquired from Mr. Margolies in the past year whether he is still doing business with Mr. Molesworth?

A. Who is Mr. Margolies? Which one?

Q. Mr. Margolies is the gentleman in the Hobbs Stamp Company, and who put in some letter from the Hobbs Stamp.

A. Al Margolies? No, I had no further correspondence with him afterwards.

(Testimony of Stephen Ward Gerber.)

Q. After you got the information that was put in evidence here from these people, you made no attempt before publishing these articles on October 30 and subsequent months to get any other information that might show you you were wrong, did you?

A. After the article was published? Certainly not.

Q. That is, after the first article. After the first article and before you published the second article, you made no effort to find out whether you were wrong or not?

A. I still contend I am right. I say I am not wrong. I published facts. You say I am wrong.

The Court: You are always making speeches, like all the other columnists. The question didn't ask for that. If you will calm yourself and listen. He asked you—Read the question.

(Question read.)

A. I said I wasn't wrong. [190]

The Court: He asked if you made any effort to find out if you were wrong or not, that was the question, between the time you published the first article and the time you published the second article.

The Witness: No, sir.

The Court: And between the time you published the second article and the time you published the third article, you made no effort to find out whether you were wrong?

The Witness: Wrong in what, please? In the

(Testimony of Stephen Ward Gerber.)

third article I was absolutely right. I quoted a letter.

Q. (By Mr. Abrams): When Mr. Hurst told you nothing derogatory about this young man, this young fellow, did you think you should publish that in your column to take some of the sting out of what you had published about him, if you were acting in good faith as you were trying to tell the Court you were.

A. If you will refer—the answer to that is Yes. There is an article in *Weekly Philatelic Gossip* in which I print Molesworth's explanation of the substitution, of the misrepresentation of the stamps.

Q. Will you produce that article?

A. Yes, I think that is in the courtroom.

Q. On March 6, 1948—what is the date suit was brought? Suit was brought in this case in 1946.

Mr. Bloom: That is before the libel.

Mr. Abrams: Oh, I see. I am sorry; I was thinking of [191] 1949. What you are telling us is that after the substitution of 460 for 478 that we have heard about, you wrote on March 6, 1948, before you published the first article on October 30, 1948, the following: "Jack E. Molesworth of Boston points out that the culprit primarily responsible for selling a Scott No. 460 as No. 478 was a Boston auction house that apparently did not authenticate the stamps it offered in its sales."

I would like to offer this.

A. That was Molesworth's explanation and I published it in justice to him.

(Testimony of Stephen Ward Gerber.)

(A document was marked Plaintiff's Exhibit 20 in evidence.)

Q. (By Mr. Abrams): So that you knew, Mr. Gerber, before you published the libel in question that Mr. Molesworth, and you had put in your column, had made an explanation of the substitution of that stamp by a Boston auction house?

A. I don't consider it libel. I took into consideration what Mr. Molesworth told me and those subsequent facts that developed prompted me to write that article.

Q. So that even though you had before you, before you published the article, the facts involved in that auction——

A. I didn't say they were facts. I said that was his report.

Q. You had before you Mr. Molesworth's explanation at the time you published the statement on October 30?

A. Yes, that was taken into consideration. [192]

Q. And despite the fact that you had that explanation, which you considered good enough to print in your column in March, 1948, you went ahead with these statements?

A. The answer is perfectly simple. I think that answer is obvious. Certainly, I gave the man a chance to make his explanation, but I couldn't accept that as a valid excuse. When these other situations developed that culminated into a situa-

(Testimony of Stephen Ward Gerber.)

tion I thought was inimical, I published. Had that transaction only existed, there never would have been a word said. There were other breaches.

Q. Isn't it a fact that March, 1948, was before your own auction sale in May? A. I said so.

Q. And you got sore personally because of his return and his claim you had misdescribed the stamps, and you revived the whole business about 460 and 478 in your October 30 issue?

A. If you look at the October 30 issue you will see that is only one statement.

Q. At the time you published this article you had nothing against Jack Molesworth, I mean no animus against him? A. I have none today.

Q. But it is published in October, after you had your own personal controversy with him, didn't you?

A. And I also, as the testimony will show, had conducted an investigation and had found that the experience of many others [193] was the same as my own experience and opinion.

Q. Let's see. You say you have nothing against Mr. Molesworth today? A. Absolutely not.

Q. And have you in the past six months, we will say, taken the trouble to point out that the American Stamp Dealers Association upheld Mr. Molesworth on that thing you were libeling him about in your article on the return of \$270 worth of stamps out of that \$300?

Mr. Arguello: You are asking some details of a

(Testimony of Stephen Ward Gerber.)

matter not in evidence, of which we have no way—which I do not believe is material.

The Court: When did you say this occurred, this proceeding before some organization?

Mr. Abrams: This occurred before the time of the publication of the first October 30 proceeding, your Honor. It is referred to, I think, in either the first or second—you will find something there. I have read it. \$270 out of \$300——

The Court: I understand that, but you said something about some meeting which approved the action.

Mr. Abrams: The American Stamp Dealers Association approved the action.

The Court: When did that occur?

Mr. Abrams: Let's have the date when that happened. [194]

The Court: I have to know the date in order to rule on the materiality.

Mr. Abrams: This is the Hy Bedrin. All right. Prior to December 31, 1948, your Honor, the action was taken by the American Stamp Dealers Association, because this letter is dated that, and without trying to get the contents in, it tells what the Board did in this letter.

Q. (By Mr. Abrams): You knew at the time you published——

Mr. Arguello: I object to any questions about that transaction. It isn't in evidence.

The Court: He can ask if the witness knew about this.

(Testimony of Stephen Ward Gerber.)

Q. (By Mr. Abrams): Did you know that, with regard to the transactions Mr. Molesworth had with Mr. Hy Bedrin, the American Stamp Dealers Association sustained Mr. Molesworth and sustained his rejection of the stamp in question?

A. It is utterly ridiculous, impossible for me to know. It is too far-fetched.

Q. The answer is that you didn't know about it?

A. I knew nothing about it, no intimation, no suspicion. I don't know why he is asking it.

The Court: Let's have in mind all this speech-making—The question is simple. Did you have any knowledge of this action of this Association of stamp dealers?

The Witness: No, sir.

The Court: You did not know about it? All right. [195]

Q. (By Mr. Abrams): That is how you want to leave your testimony with regard to what you were considering wrong about Mr. Molesworth, from that day to this you never heard anything from anybody about the action of the American Stamp Dealers Association?

A. I said that was so. I answered it.

Q. I want to make sure. You haven't heard?

A. I answered that. I said no, I haven't heard it, not by the slightest stretch of imagination. Wouldn't make any difference.

Q. It wouldn't make any difference what you heard about Mr. Molesworth?

(Testimony of Stephen Ward Gerber.)

A. No, for their dealings on the record. I have made them the object of discussion, too.

Q. Well, did you also indict a Lew Marsh Company? A. No.

Q. Stamp Aid Company?

A. I don't know them.

Q. Robert A. Siegel of New York?

A. Robert A. Siegel I will accept.

Q. Did you write him about Mr. Molesworth?

A. No. I couldn't write to all of them. There are probably 350 auction houses in the United States.

Q. Did you consider you were treating this young man fairly if you only wrote to two or three dealers out of 200 or 350 and then wrote this article? A. Absolutely.

Q. That was your state of mind, what you considered a fair deal?

A. Absolutely, just take a cross-section like a poll is taken. [198]

Q. Well, you don't mean that?

A. I don't know. I mean, you can't write to everyone. You could only take a cross-section.

Mr. Abrams: I am not going to take any more of this Court's time, your Honor.

The Court: Is that all with the witness?

Mr. Arguello: That is all.

The Court: That is all. You may step down. I want to ask you one question, if you will come back. I notice that a rather worthy purpose is stated in

(Testimony of Stephen Ward Gerber.)

the editorial page of your column and as to its purposes.

The Witness: Yes, sir.

The Court: To eliminate trickery and unfair dealings in the business.

The Witness: That is true, sir.

The Court: How would you possibly accomplish that by writing an anonymous article about——

The Witness: You mean the first article?

The Court: What possible good could you do the industry by writing an anonymous article that nobody would know who you were talking about?

The Witness: They correct their methods of doing business. They would change their ways of doing business and I wouldn't have to bother with them any more.

The Court: It is a lot of power, isn't it, for a man of [199] your standing in society to have to determine the standards of conduct of people engaged in this business? Well, I think that is all.

* * *

JACK E. MOLESWORTH

the plaintiff, recalled in rebuttal; previously sworn.

Direct Examination

By Mr. Abrams:

Q. Mr. Molesworth, in this Bedrin business, will you tell the Court what the transaction was?

A. The first transaction was a transaction wherein the total invoice value of the lots was \$352.10.

(Testimony of Stephen Ward Gerber.)

A. What you are talking about. I don't know what you are talknig about. You didn't read me any proceedings.

Q. You want to tell the Court at the present time you have no feelings whatsoever against Mr. Molesworth, have you?

A. No animosity whatsoever.

Q. No animosity whatsoever? Now, you must have sent out inquiries to some of the leading stamp dealers with whom Mr. Molesworth does business before you published that article on October 30 of him, didn't you?

A. I answered that. I sent inquiries to certain stamp dealers.

Q. And the best you have been able to produce here in justification of what you have done is Ohlman and these others that you have mentioned, is that correct? [196]

A. Please permit me to repeat my answer that everything I wrote is true. I am still certain it is true.

Q. Please——

A. You are asking the same question over and over again, just phrasing it different for your purpose.

Q. Mr. Gerber, did you find out who the principal houses were in New York City and in Boston with whom Mr. Molesworth did his business before you wrote those articles in question?

(Testimony of Stephen Ward Gerber.)

A. No. I couldn't get them except from Mr. Molesworth.

Q. Did you ask Mr. Molesworth to tell you who he did business with before publishing those articles? A. I found no reason for it.

The Court: Well, you didn't do it?

A. No, sir.

Q. (By Mr. Abrams): Well, now, the Ohlman Galleries haven't run any auctions for a couple of years, have they?

A. Yes, sir, they ran one, a small auction, less than a year ago and retired from the auction business. Probably the most famous, well-beloved auctioneer in the business.

Q. Mr. Bedrin, whose letter you have put in, never brought to your attention anything about the action of the Stamp Dealers Association?

A. No.

Q. And did you inquire of some of these leading concerns like Harmer, Rooke & Co., Jack Morrison, Inc.? [197]

A. They are not my ideas of leading concerns. I have indictments against both of them.

Q. You have?

A. I have indictments of my own against both of them.

Q. You have indictments?

A. That is what I said, yes, sir. I indict both of them.

Q. You mean mentally?

(Testimony of Stephen Ward Gerber.)

A. No, for their dealings on the record. I have made them the object of discussion, too.

Q. Well, did you also indict a Lew Marsh Company? A. No.

Q. Stamp Aid Company?

A. I don't know them.

Q. Robert A. Siegel of New York?

A. Robert A. Siegel I will accept.

Q. Did you write him about Mr. Molesworth?

A. No. I couldn't write to all of them. There are probably 350 auction houses in the United States.

Q. Did you consider you were treating this young man fairly if you only wrote to two or three dealers out of 200 or 350 and then wrote this article? A. Absolutely.

Q. That was your state of mind, what you considered a fair deal?

A. Absolutely, just take a cross-section like a poll is taken. [198]

Q. Well, you don't mean that?

A. I don't know. I mean, you can't write to everyone. You could only take a cross-section.

Mr. Abrams: I am not going to take any more of this Court's time, your Honor.

The Court: Is that all with the witness?

Mr. Arguello: That is all.

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the editorial page of your column and as to its purposes.

The Witness: Yes, sir.

The Court: To eliminate trickery and unfair dealings in the business.

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* * *

JACK E. MOLESWORTH

the plaintiff, recalled in rebuttal; previously sworn.

Direct Examination

By Mr. Abrams:

Q. Mr. Molesworth, in this Bedrin business, will you tell the Court what the transaction was?

A. The first transaction was a transaction where-in the total invoice value of the lots was \$352.10.

(Testimony of Jack E. Molesworth.)

Q. Yes.

A. The total \$274.15 was returned for major defects, various undescribed defects in the stamp.

Q. Have you got your original sale that you marked at the time you got these lots from his auction?

A. I have this invoice, a subsequent transaction. I have not made specific note as to the consideration.

Q. After this transaction with Mr. Bedrin did you, in accordance with the practice at the time, deliver the stamp you got, together with the catalog, to the American Stamp Dealers Association?

A. Not on this one incident, no, because subsequently he apologized for this and I accepted it. I have it here.

Q. Something referred to in the deposition—I am not going to waste too much time— [202]

Mr. Arguello: I object if it is something—some other transaction.

Mr. Abrams: I am talking about his testimony in this deposition.

Q. Did you have some dealings with him wherein you took the catalog and the stamp he sent you and handed them over to the American Stamp Dealers Association?

A. Yes, I did. His invoice in that is dated October 25, 1948.

Q. Is that the same Bedrin who testified in this deposition against you?

(Testimony of Jack E. Molesworth.)

A. That is the same man.

Q. As a result of that where you took the stamp to the American Stamp Dealers Association, were you notified that the American Stamp Dealers Association had sustained your statement, or your position?

Mr. Arguello: I object to that. It isn't material. It is general, calling for an opinion and conclusion of the witness. The statement isn't connected with the issues in this case, the details of some other transaction that took place between Mr. Molesworth and Mr. Bedrin, which other transaction has not been identified at all.

The Court: Counsel says you have offered the deposition of this witness in evidence, and the witness has testified, as I understand from counsel, as to transactions with [203] the plaintiff.

Mr. Bloom: That is correct.

Mr. Giometti: Well, if your Honor please, I think the point is the deposition states that Mr. Bedrin informed Mr. Gerber of something that took place with Mr. Molesworth. It is my position it is immaterial whether what he says was true or not. In other words, the important thing is, Did he so inform Mr. Gerber? That is what we are looking for.

The Court: But if the witness testified in that deposition which you have offered, in response to questions, as to transactions which he had with the plaintiff, that would go to the matter of the truth

(Testimony of Jack E. Molesworth.)

of the libel, alleged libel, and certainly the plaintiff has a right to take issue with that. I can't tell whether the testimony offered by this witness on the taking of the deposition by you had to do with the issue of truth or malice or any other issue in the cause. You testified and the other side has a right to controvert it. I don't know what the testimony would be.

Mr. Giometti: I ask the witness refer specifically to the place he is referring to.

Mr. Abrams: "Do you remember that he complained about it"—page 34—"he complained about it being grossly misdescribed? Do you remember that?"

"A. Now I remember that, yes. In November, yes. Now, wait a minute—was it last year, in 1948?"

"Q. Yes. [204]"

"A. Yes. I remember that."

"Q. You do remember that? A. Yes."

"Q. Do you remember also that he returned them to the American Stamp Dealers Association?"

"A. That's right. He did."

"Q. And he made a charge against you there?"

"A. He did."

"Q. And is it a fact also that you were tried on that charge and found guilty? Isn't that so?"

"A. I was not."

"Q. Is it not a fact that you were reprimanded by that Association?"

Then there is an objection. Further on he testi-

(Testimony of Jack E. Molesworth.)

fied that the stamp was what he claimed it was, and this man returns it, and it is on that basis I am rebutting that statement and showing the reason why this witness testified as he did. On direct examination he was asked, page 40:

“Do you have the date in your records when the last transaction was made with Mr. Molesworth?”

“A. I would have to look it up.

“Q. If I told you that your invoice was dated October 25, 1948, would that refresh your recollection? A. It might be right.

“Q. And Mr. Molesworth returned the stamps with a letter [205] dated October 31, 1948, did he not? A. He did.”

I call your Honor's attention to the fact that these dates are after the date of the first libel and the fact that Mr. Gerber testified he relied on what Mr. Bedrin told him, after he published the libel.

“A. He did.

“Q. When did he return them?”

“A. He never returned them to me.”

Standing alone, that might be serious.

“Q. Who did he return them to?”

“A. To the American Stamp Dealers Association.

“Q. He sent them right to the American Stamp Dealers Association? A. That's right.

“Q. And they took the matter up with you?”

“A. That's right.

“Q. And you got your stamps back from them?”

(Testimony of Jack E. Molesworth.)

“A. Oh, sure, definitely.

“Q. Did you ever have any talks with Mr. Molesworth?

“A. I only met him once or twice. I never spoke to him.”

Q. (By Mr. Abrams): Now, Mr. Molesworth, coming to Mr. Ohlman, how many transactions did you have with Mr. Ohlman? A. Two.

Q. Two, in your entire experience? [206]

A. Yes.

Q. Will you get the exhibit there? You heard what Mr. Ohlman said, that you were technically correct in making the return?

The Court: That letter is in evidence. I read it.

Q. (By Mr. Abrams): Well, were you right in both? He has testified he was right in both.

A. Yes, I was definitely right in both. I have the dates of the transactions there.

Q. So that in both transactions you were definitely right in your transactions with Ohlman?

A. Definitely.

Q. What were the dates of those transactions?

A. The first one was approximately May 7, 1948. That was the date of his invoice. I paid for it, I think, on May 14, within seven days after date of the invoice. The second was on July 29, 1948, and I paid for it within two days of the invoice by check dated the 31st of July.

Q. With regard to Margolies, who testified here, what has been your experience with Margolies?

(Testimony of Jack E. Molesworth.)

A. Margolies operates both in M & S and Hobbs. I have bought quite a few from him at private sale from M & S and Hobbs. In his testimony there he mixes the two. When I bought at private sale our express understanding was any item could be returned any time. The terms were such, whenever I felt like [207] paying I paid.

Q. Do you still do business with him?

A. I still do business with him.

Q. Have you got a letter from him in court?

A. Yes, it is right there. There is a letter in court marked in court.

Q. It has been marked for identification?

A. Yes. He admits I still do business with him in the deposition.

Q. Then it is all right. "Whatever explanation Mr. Molesworth would make would be accepted without question." That is about all as far as the deposition is concerned.

A. I am mistaken about that. The letter I referred to was from Fox.

Q. But you have a letter which Mr. Bloom unsuccessfully attempted to get in evidence as to the people you were doing business with now.

A. I have letters from Mr. Margolies.

Mr. Arguello: I object to this.

Q. (By Mr. Abrams): Are you doing business with this man now?

A. A transaction is now pending between us as of this date. [208]

The Court: I don't think there would be much purpose for you to discuss the facts, because they are clear in my mind. I have already indicated, at the time plaintiff's case went in, how I felt about this case, and I think it probably would be better if you know about it now so that if there is anything you wish to clear up you will have an opportunity to do so. Of course, I could just tell you nothing and then you could blindly pursue a path of submitting anything you thought of, but I know when I was practicing law it was always helpful to me to know what I was up against. Even though I found I was up against something that was difficult, it was always stimulating to know as then it might make one work harder. [212]

Mr. Arguello, I think this is clearly a case on the facts where an example should be made, whether that should take the form of exemplary damages or the form of damages to the feelings, as counsel says might be done under the law of Massachusetts, which matter you gentleman can hereafter comment upon if you wish.

It is really rather a sad commentary upon the system we seem to have fallen into in America that men can set themselves up as supermen and gods because they assume the title of columnist, and proceed to tear down utterly, ruthlessly, the character of private citizens. It is completely abhorrent to me that a man may have the effrontery to assume himself the power which should be reserved to the angels, or at least on a mundane plane, to men who,

like judges, at least have objectivity, the power to ruthlessly and scandalously, to suit their own personal purpose and with complete arrogance, break down the character of fellow citizens. I think this is a horrible example of what we have fallen into, apparently, by allowing these men who call themselves columnists, on the sheerest hearsay, to satisfy personal peevishness, and with the power that the pen gives them, to engage in the sort of scurrilous writing that is evident in this case.

I think this defendant is a dangerous man, and if I had the power I would incarcerate him, because there is no greater harm that can be done than by these scurrilous and scandalous [213] and arrogant attacks from the press by people of this kind upon citizens. "Such men are dangerous," as Shakespeare said.

Here is a young man twenty-two years old, just got out of the Navy, a mere youth, known to be a mere youth, and this man of forty years' experience, he says, in this business proceeds to tear him about with language that is amazing.

Well, I don't care to say any more about that. There is nothing much that can be done, I suppose, in the way of making retribution, except some kind of an award. But what an opportunity for a man of decency and character to have made amends for what was done here. But no, he wasn't going to listen to anything. He was ready to indict and the indictment came forth, and he wouldn't listen to any facts that this young man wanted to present.

He had assumed to himself the power to just change a man's whole course of life. I have read a lot of cases of libel and I never saw anything quite as bad as this. The character of the language, the utter arrogance of a man who sets himself up to be a judge of his fellow man, perhaps to ruin him by just a few words on some paper. It is unexplainable to me. [214]

* * *

CERTIFICATE OF REPORTER

I, Kenneth J. Peck, Official Reporter, certify that the foregoing pages are a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ KENNETH J. PECK.

[Endorsed]: Filed December 29, 1949. [215A]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or a true and correct copy of an order entered on the minutes of this Court, in the above-entitled case, and that

they constitute the Record on Appeal herein, as designated by the parties, to wit:

Complaint for Libel.

Motion of Defendant Stephen W. Gerber to Dismiss.

Minute Order of April 4, 1949—Order Denying Motion to Dismiss Complaint.

Answer of Defendant.

Supplemental Complaint for Libel.

Answer of Defendant to Supplemental Complaint for Liability.

Notice of Intention to Introduce Evidence of Subsequent Libels.

Order for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Intention to Move for a New Trial and to Amend Findings of Fact and Conclusions of Law and Judgment.

Order Denying Motions and Taxing Costs.

Notice of Appeal to Circuit Court of Appeals Under Rule 73(b).

Designation of Record on Appeal.

Designation by Appellee of Additional Portions of Record.

Depositions of Max Ohlman, Arthur Margolies and Henry Bedrin, held in the United States Court-house, Foley Square, New York, N. Y., on the 30th day of August, 1949, at 10:30 a.m. Filed September 2, 1949.

Reporter's Transcript for September 1 and 2, 1949. Filed December 29, 1949.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

Defendant's Exhibits Nos. A, B, C, D, E, F and G.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 7th day of March, A.D. 1950.

C. W. CALBREATH,

Clerk.

[Seal] By /s/ M. E. VAN BUREN,

Deputy Clerk.

[Endorsed]: No. 12492. United States Court of Appeals for the Ninth Circuit. Stephen W. Gerber, Appellant, vs. Jack E. Molesworth, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 7, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
Ninth Judicial Circuit
No. 12492

JACK E. MOLESWORTH,

Plaintiff,

vs.

STEPHEN W. GERBER,

Defendant.

APPELLANT'S STATEMENT OF POINTS
FOR APPEAL AMENDED

Pursuant to Rule 19 of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, the Appellant sets forth below the points upon which he intends to rely on his appeal:

Point One: That plaintiff has failed to prove a cause of action against defendant, in that each of the statements alleged to be libellous and upon which the judgment was based, were, and are true; or if truth is not a complete defense that it is a bar to punitive damages.

Point Two: That the articles written by defendant were conditionally, or qualifiedly privileged, and that such privilege is a defense to this action.

Point Three: That the judgment was excessive.

Point Four: That findings of fact No. 6, 7, 8, 9, 10 and ~~12~~, and conclusions of law No. ~~4~~ and ~~2~~ are not supported by the evidence.

/s/ ARGUELLO & GIOMETTI,
Attorneys for Appellant.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

Defendant's Exhibits Nos. A, B, C, D, E, F and G.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 7th day of March, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12492. United States Court of Appeals for the Ninth Circuit. Stephen W. Gerber, Appellant, vs. Jack E. Molesworth, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 7, 1950.

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In The United States Court of Appeals
Ninth Judicial Circuit
No. 12492

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Plaintiff,

vs.

STEPHEN W. GERBER,

Defendant.

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Point Four: That findings of fact No. 6, 7, 8, 9, 10 and ~~12~~, and conclusions of law No. ~~1~~ and ~~2~~ are not supported by the evidence.

/s/ ARGUELLO & GIOMETTI,
Attorneys for Appellant.

In the United States District Court for the North-
ern District of California, Southern Division

No. 28610G

JACK E. MOLESWORTH,

Plaintiff,

vs.

STEPHEN W. GERBER,

Defendant.

APPELLANT'S DESIGNATION OF RECORD
FOR APPEAL

Appellant designates the following portions of the record as material to his appeal

1. Plaintiff's complaint filed February 4, 1949.
2. Defendant's answer filed April 14, 1949.
3. Plaintiff's supplemental complaint filed July 5, 1949.
4. Defendant's answer to Supplemental Complaint filed July 26, 1949.
5. The following portions of the transcript of Evidence filed December 29, 1949.

- (a) Page 3 Line 9 to Page 3 Line 17.
- (b) Page 27 Line 26 to Page 33 Line 16.
- (c) Page 37 Line 15 to Page 38 Line 5.
- (d) Page 48 Line 15 to Page 49 Line 13.
- (e) Page 54 Line 19 to Page 58 Line 11.
- (f) Page 58 Line 24 to Page 64 Line 7.
- (g) Page 64 Line 11 to Page 70 Line 23.
- (h) Page 73 Line 6 to Page 73 Line 14.

- (i) Page 75 Line 20 to Page 78 Line 14.
- (j) Page 80 Line 15 to Page 82 Line 5.
- (k) Page 90 Line 22 to Page 96 Line 23.
- (l) Page 96 Line 25 to Page 98 Line 21.
- (m) Page 108 Line 6 to Page 109 Line 25.
- (n) Page 113 Line 20 to Page 115 Line 12.
- (o) Page 136 Line 17 to Page 141 Line 6.
- (p) Page 168 Line 4 to Page 169 Line 5.
- (q) Page 169 Line 18 to Page 169 Line 25.
- (r) Page 185 Line 15 to Page 186 Line 22.

6. The following exhibits

- (a) Plaintiff's No. 1.
- (b) Plaintiff's No. 2.
- (c) Plaintiff's No. 7. (Only 1st page in brackets.)
- (d) Plaintiff's No. 13.
- (e) Plaintiff's No. 14.
- (f) Defendant's Exhibit A.

7. Findings of Fact and Conclusions of Law filed November 23, 1949.

8. Judgment entered December 2, 1949.

/s/ ARGUELLO & GIOMETTI,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 17, 1950.

In The United States Circuit Court of Appeals
for the Ninth Circuit

No. 12492

JACK E. MOLESWORTH,

Appellee,

vs.

STEPHEN W. GERBER,

Appellant.

APPELLEE'S DESIGNATION OF RECORD
ON APPEAL

To the Honorable, the above-entitled Court, and
to the Clerk of said Court:

Appellee Jack E. Molesworth hereby designates
the following additional parts of the record which
he thinks material to the appeal herein:

(1) Notice of Intention to Introduce Evidence
of Subsequent Libels, dated August 17, 1949, filed
August 18, 1949.

(2) The following portions of the Reporter's
Transcript of evidence filed December 29, 1949:

- (a) Page 13 Line 5 through Page 13 Line 8.
- (b) Page 14 Line 6 through Page 14 Line 25.
- (c) Page 16 Line 4 through Page 16 Line 15.
- (d) Page 16 Line 23 through Page 20 Line 17.
- (e) Page 27 Line 6 through Page 27 Line 25.
- (f) Page 33 Line 17 through Page 34 Line 3.
- (g) Page 34 Line 23 through Page 35 Line 21.
- (h) Page 36 Line 5 through Page 36 Line 23.
- (i) Page 38 Line 6 through Page 39 Line 10.

- (j) Page 39 Line 19 through Page 40 Line 3.
- (k) Page 41 Line 11 through Page 41 Line 18.
- (l) Page 41 Line 24 through Page 42 Line 5.
- (m) Page 42 Line 23 through Page 43 Line 3.
- (n) Page 46 Line 12 through Page 52 Line 11.
- (o) Page 52 Line 25 through Page 53 Line 6.
- (p) Page 53 Line 16 through Page 54 Line 2.
- (q) Page 58 Line 12 through Page 58 Line 22.
- (r) Page 64 Line 8 through Page 64 Line 10.
- (s) Page 71 Line 24 through Page 73 Line 4.
- (t) Page 88 Line 20 through Page 90 Line 20.
- (u) Page 99 Line 24 through Page 102 Line 13.
- (v) Page 103 Line 6 through Page 103 Line 16.
- (w) Page 105 Line 3 through Page 106 Line 25.
- (x) Page 107 Line 9 through Page 107 Line 14.
- (y) Page 110 Line 18 through Page 112 Line 7.
- (z) Page 119 Line 7 through Page 119 Line 20.
- (aa) Page 121 Line 25 through Page 124 Line 7.
- (bb) Page 124 Line 17 through Page 126 Line 5.
- (cc) Page 126 Line 25 through Page 127 Line 1.
- (dd) Page 127 Line 9 through Page 127 Line 19.
- (ee) Page 141 Line 8 through Page 141 Line 16.
- (ff) Page 143 Line 2 through Page 143 Line 12.
- (gg) Page 144 Line 24 through Page 145 Line 11.
- (hh) Page 147 Line 19 through Page 148 Line 13.
- (ii) Page 150 Line 1 through Page 150 Line 7.
- (jj) Page 155 Line 12 through Page 157 Line 18.
- (kk) Page 158 Line 25 through Page 159 Line 24.
- (ll) Page 162 Line 16 through Page 167 Line 25.
- (mm) Page 169 Line 6 through Page 169 Line 17.
- (nn) Page 172 Line 11 through Page 175 Line 7.
- (oo) Page 179 Line 5 through Page 179 Line 17.

- (pp) Page 180 Line 2 through Page 181 Line 25.
- (qq) Page 183 Line 20 through Page 184 Line 3.
- (rr) Page 186 Line 23 through Page 189 Line 3.
- (ss) Page 190 Line 1 through Page 200 Line 3.
- (tt) Page 202 Line 4 through Page 208 Line 21.
- (uu) Page 212 Line 14 through Page 214 Line 20.

(3) The following exhibits:

- (a) Plaintiff's No. 2.
- (b) Plaintiff's No. 3.
- (c) Plaintiff's No. 4.
- (d) Plaintiff's No. 5.
- (e) Plaintiff's No. 6.
- (f) Plaintiff's No. 8.
- (g) Plaintiff's No. 9.
- (h) Plaintiff's No. 10.
- (i) Plaintiff's No. 11.
- (j) Plaintiff's No. 12.
- (k) Plaintiff's No. 15.
- (l) Plaintiff's No. 19.
- (m) Plaintiff's No. 20.
- (n) Defendant's Exhibit D.
- (o) Defendant's Exhibit E.

(4) The depositions of Max Ohlman, Arthur Margolies, and Henry Bedrin, on file herein, and referred to in the Reporter's Transcript, page 201 line 9 through page 201 line 19.

/s/ LEONARD J. BLOOM,

/s/ M. S. HUBERMAN,

Attorneys for Appellee.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 27, 1950.

[Title of Circuit Court of Appeals and Cause.]

MOTION OF APPELLEE FOR TRANSMISSION OF EXHIBITS ON APPEAL IN ORIGINAL FORM

To the Honorable, the above-entitled Court:

Appellee Jack E. Molesworth hereby respectfully requests this Honorable Court for its consent and permission for the transmission as part of the record on appeal in the above action of the following exhibits and depositions in their original form and without printing:

(1) Plaintiff's Exhibits Nos. 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 15, 19 and 20;

(2) Defendant's Exhibits D and E;

(3) The depositions of Max Ohlman, Arthur Margolies, and Henry Bedrin, on file herein, and referred to in the Reporter's Transcript, page 201 line 9 through Page 201 line 19.

This motion is based on the fact that such consent and permission will promote the ends of justice in that the printing of the aforesaid matter would constitute an unnecessary and unreasonable burden on appellee Jack E. Molesworth, and on the further ground that the transmission of said matter in its original form will in no way impede this Honorable Court in the determination of the above appeal.

Attached hereto and made a part hereof is the Affidavit of Leonard J. Bloom, one of the attorneys

for appellee, setting forth the facts upon which this application is made.

/s/ LEONARD J. BLOOM,

/s/ M. S. HUBERMAN,

Attorneys for Appellee.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF LEONARD J. BLOOM IN
SUPPORT OF MOTION OF APPELLEE
FOR TRANSMISSION OF EXHIBITS ON
APPEAL IN ORIGINAL FORM

State of California,
City and County of San Francisco—ss.

Leonard J. Bloom, being first duly sworn, deposes and says:

I am one of the attorneys for appellee Jack E. Molesworth and make this affidavit for and in his behalf. The facts herein stated are within my knowledge.

Pursuant to Rule 19 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, appellant has heretofore filed herein his designation of the portions of the record on appeal which he wishes printed. Said appellant has also filed an amended "Statement of Points for Appeal" which designates a variety of alleged grounds of appeal, including the alleged failure of the evidence to support six Findings of Fact and two Conclusions of Law. Despite this fact appellant desig-

nates in his "Designation of Record for Appeal" as material a very small part of the record before the lower Court. This has necessitated the designation as material by appellee of the greater part of the Reporter's Transcript and other portions of the record of the lower Court.

Appellee Jack E. Molesworth is a person of very modest financial circumstances and would find it extremely burdensome and difficult to advance all of the funds necessary for the printing of the portions of the record which he designates as material on this appeal.

A substantial saving could be effected in this respect by the transmission in their original form of the exhibits mentioned in paragraph (3) of Appellee's Designation of Record on Appeal and of the depositions mentioned in paragraph (4) of said Designation. Some of these exhibits are lengthy and contain much extraneous matter not directly material to the appeal. This is also true of the aforesaid depositions which were taken by appellant. For the purpose of this appeal specific reference could readily be made by the parties, if they so desire, to particular parts of these exhibits or depositions to substantiate argument on appeal, without the necessity of having the entire printed record thereof before the Court. In all probability this Honorable Court will have occasion to refer to a small part only of these exhibits or depositions.

The granting of the aforesaid request will be of substantial financial assistance to appellee Jack E.

Molesworth, who will be relieved thereby of the necessity of advancing the costs of the printing of the aforesaid material. In view of large amount of other matter from the Reporter's Transcript which must be printed on appeal, this saving is of particular importance to one in appellee's financial condition.

Respectfully requested,

/s/ LEONARD J. BLOOM.

Subscribed and sworn to before me this 27th day of March, 1950.

[Seal] /s/ [Indistinguishable],

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires February 7, 1953.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WILLIAM HEALY,

/s/ WALTER POPE,
U. S. Circuit Judges.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 28, 1950.

In the United States District Court for the
Northern District of California, Southern
Division

No. 28610

JACK E. MOLESWORTH,

Plaintiff

vs.

STEPHEN W. GERBER,

Defendant.

ORDER DENYING MOTIONS AND
TAXING COSTS

Judgment was heretofore entered in this cause in favor of the plaintiff and for his costs of suit. The Clerk has taxed the costs at a total of \$320.56, the amount specified in the cost bill filed by the plaintiff.

The defendant has made, without argument, three motions: (1) for a new trial; (2) to amend the findings of fact, conclusions of law, and judgment; (3) to review the taxation of costs by the Clerk and strike from his order certain items allowed.

The motions for a new trial and to amend the findings of fact, conclusions of law, and judgment are denied. The \$20 witness fee of Joseph B. Abrams, one of the plaintiff's attorneys of record, is ordered stricken from the cost bill.

Dated: January 17, 1950.

/s/ LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed January 17, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF
APPEALS UNDER RULE 73(b)

Notice Is Hereby Given that Stephen W. Gerber, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Judicial Circuit, from the final judgment entered in this action on December 2, 1949, and from the Order Denying Motions and Taxing Costs entered in this action on January 18, 1950.

Dated: February 1, 1950.

/s/ ALEX L. ARGUELLO, for

/s/ ARGUELLO & GIOMETTI,

Attorneys for Appellant,

Stephen W. Gerber.

[Endorsed]: Filed February 2, 1950.

